The Central Law Journal.

ST. LOUIS, JANUARY 18, 1889.

CURRENT EVENTS.

FOLLOWING upon the heels of the public discussion, as to the legality of "trusts," to which we called attention, in our last issue, comes a decision by Judge Barrett, of the Supreme Court of New York, bearing upon the sugar "trust." The popular mind, ignorant of the technical meaning of the decisions of courts, and grasping simply at the shadow of things, has proclaimed this case as a direct and substantial blow at "trusts," and interpreted it to mean the complete and immediate overthrow of that gigantic partnership. Nothing, however, could be further from the facts, though the decision, of course, has a tendency in that direction. The facts, succinctly stated, are these: The "trust" rests upon a written agreement styled the trust deed. Under this deed, all the corporations which are to enter the combination, agree that all the shares, of the capital stock of all the corporations, shall be transferred to a board, consisting of eleven persons as trustees, joint tenants, subject to the purposes set forth in the deed, viz: To promote economy and reduce cost of manufactured article, to give to all the use of appliances used by the others, to furnish protection against unlawful combinations of labor, to protect against lowering standard of manufactured articles, and generally to promote the interests of all parties in all lawful ways. This board was in effect to manage the allied and combined interests. The stock, held in each individual corporation, was to be transferred to this board, who were to issue to each corporation in lieu of said stock, trust certificates, in value equal to the appraised net assets of each corporation. Thereafter the original corporate shareholder ceases to hold any further relations with his particular corporation, and thenceforward he is treated, as a shareholder, in the trust board. All profits arising from the business of each corporation, is to be paid to the trust board, who blend all the profits, received from all the corporations, into one grand mass, and from that aggregation declare such dividends as may seem appropriate. Thus, we have a series of corporations, existing and transacting business, under the forms of law, without real membership, or genuinely qualified direction—mere abstract figments of statutory creation, as Judge Barrett says, without life in the concrete, or underlying association.

This suit was a *quo warranto* against one of these corporations, asking for its forfeiture and dissolution. The court, in awarding the writ and declaring judgment of forfeiture, proceeds upon the ground that the corporation has entered into a combination and exercised privileges and franchises not conferred upon it by law; that any act of a corporation which is forbidden by its charter or by a general rule of law, and strictly every act which the charter does not expressly or impliedly authorize is unlawful. This was the gist of the decision, and so far as that case was concerned, it was sufficient. But the court thereafter, entered into an extended consideration of the question, whether such combination into which the corporation unlawfully entered, is an injury to the public, and unlawful in itself. This question was decided in the affirmative. Judge Barrett and Prof. Dwight are thus at issue on the latter question, and we are frank to admit that a study of the arguments of both, leaves the student much in doubt.

THE profession will find much to interest and instruct them in the new book written by Prof. James Bryce, of England, entitled "The American Commonwealth." The object of the book is to tell the truth about us and our institutions, and it appears that he qualified himself for the task by thorough personal investigation. It is a rare thing to find a foreigner who is able to understand the relations of the judiciary to the other departments of our government. Its absolute independence of the executive and legislative branches, for one educated in a country where there is no clearly defined line of separation between them, and no written constitution, is difficult to grasp. Prof. Bryce seems to have succeeded in this undertaking beyond the

measure of most foreign writers. He clearly shows that the judicial judgment, in determining what is the law of the case at bar, necessarily includes the determination of the prevailing law, if the constitution and a statute are in conflict. A prominent critic, however, says that he yielded too much to the tendency to assume that the judgment of the court of last resort in effect repeals a law declared unconstitutional. It cannot be too explicitly understood that in the United States the judgment is strictly limited to the decisions of the issue between a plaintiff and a defendant; the authoritative thing is the judgment for the plaintiff or the judgment for defendant. The grounds for the court's opinion form a precedent, by which lawyers will advise their clients, as to the probable result in a like case; but there is nothing to prevent the lower courts, whether federal or State, from deciding contrary to the precedent, and sending up fresh cases to give the supreme court the opportunity to overrule the former decision.

In this connection a good story is told of the late Senator Wade, of Ohio. When on the circuit bench of that State a case arose before him of considerable difficulty. He gave it full consideration and decided it. It was taken to the supreme court and there reversed. On mandate it came up before him. He disregarded the mandate and followed his own first decision, and such was his judgment. "But, your honor, the supreme court reversed your former judgment!" exclaimed the now re-beaten counsel. "Yes; so I have heard. I will give them a chance to get right," was the quiet reply. It was again taken to the supreme court and re-presented there, and this time with Judge Wade's reported opinion. On reconsideration, this was found to be the better rule. The court, instead of attaching him for contempt, reversed itself and affirmed his last judgment.

NOTES OF RECENT DECISIONS.

As appears by a recent decision of the Supreme Court of Kansas—Anderson v. City of Wellington, 19 Pac. Rep. 719—the organization known as "The Salvation Army" has achieved a legal victory in that State. An ordinance, especially directed at that body, was lately enacted by the city of Wellington, declaring it unlawful for any persons, society, association or organization, under whatsoever name, to parade any public street, avenue or alley of the city, shouting, singing or beating drums or tamborines, or playing upon any other musical instrument, or doing any other act, calculated to attract an unusual crowd of people, without first having obtained in writing the consent of the mayor, was held illegal and void, upon the ground that it was unreasonable and oppressive, and not within the delegated power of the city council. The court say that public parades are not *mala in se*, and that a proper and reasonable regulation, and not a practical prohibition thereof, is the extent of a city's power (citing Frazee's Case, 30 N. W. Rep. 72), and that it is not a reasonable regulation to vest the power arbitrarily in the mayor to grant or refuse permission under the ordinance.

In Haws v. St. Paul Fire & Marine Ins. Co., 15 Atl. Rep. 915, the Supreme Court of Pennsylvania decide a rather novel question of insurance. A policy on plaintiff's barn and its contents, specifically included horses, and as a part of the general description of the property, it was added in writing "all contained in above described barn." The policy covered loss by lightning, and contained a printed clause in the following words: "This policy does not cover or insure personal property of any kind while removed from the particular building herein described or kept or used in any other place or location, unless otherwise specified in the policy." This suit was brought upon the policy to recover for the loss of a colt killed by lightning while in the field at pasture. The company contended that, as the colt was not in the barn at the time of the casualty, it was not embraced within the terms and conditions of the policy. The plaintiff maintains, however, that the clause last quoted was inconsistent with the manifest purpose of the policy in respect of the insurance of horses. The court says:

> We cannot adopt the plaintiff's view of his case. The manifest and obvious purpose of the parties, we think, was to place the insurance on the barn and its

contents, as specified in policy. In Haws v. Association, 114 Pa. St. 431, 7 Atl. Rep. 129, which is much relied upon by the plaintiff in error, there was no such clause in the policy as quoted above, and the insurance was upon horses alone. The horses, it is true, were described as "contained in his new two-story frame barn," etc., but this was held to be mere matter of description, and that such a description did not constitute a condition which would relieve the company from obligation the moment the horse left the barn. In this case, the restrictive clause is not a mere matter of description. It is a plain, direct provision, applicable alike to all the personal property embraced in the policy, and consistent with the obvious general purpose of the parties to insure the barn and its contents.

Three of the judges dissent from this opinion in the following language:

The only season of the year when horses are exposed to lightning is in the summer, when it is well known that farmer's horses are in the field for a considerable portion of the time. Hence it is not reasonable to suppose that the parties to the contract intended that a printed form in a fire policy, intended to apply to a different matter, should be applied to defeat the insurance. In the case in hand the insurance was of personal property contained in a barn, with lightning clause added. The policy was in the usual form, with a clause that the policy should not cover any of the property while removed from the barn. This was all well enough for the inanimate property in the barn. But the lightning clause was intended for the horses. No one insures hay, grain, and farming implements from lightning. I concede the clause against removal technically covers the horses; but I still think that, as to the horses insured against lightning, it was never intended to apply, and was not and could not have been in the contemplation of the parties at the time of the making of the contract, assuming them to have been reasonable beings, capable of making a contract.

AN interesting question was involved in the decision of the case of Lampert v. Haydel, 9 S. W. Rep. 789, by the Supreme Court of Missouri. There, a testator devised lands in trust for the use of his three sons, "with power to use and enjoy equally the rents, issues and profits thereof during their natural lives," his object being "to secure to my children a certain annual income * * * and to take from them the power of disposing of the same, or creating any liens thereon, or of making the same liable in any way for their debts." This was a suit by an assignee of the interest of one of the sons, and the only question involved being whether the limitations in the will were void, as being in restraint of alienation. The court, in deciding in favor of the validity of the restriction, says:

But whatever may be the view taken by the English courts in this question, some courts of the highest authority in this country maintain the opposite view, holding that those considerations which apply to legal estates have no application where property is transferred in trust, as in such instances the trustee take the whole property, with the usual incidents of alienation, and in the like manner the beneficiary takes the legal title to the income when it is paid over to him, and therefore the point about restraints upon alienation has no foundation either in law or in fact. This is the position taken by the Supreme Court of Massachusetts, in a cause which was twice argued (Bank v. Adams, 133 Mass. 170), and the trust in that case, substantially identical with that one before us, held valid. Similar adjudications have been made in Pennsylvania, from an early period in its judicial history (Thackara v. Mintzer, 100 Pa. St. 151, and cases cited); and in other States (Vermont, Barnes v. Dow, 10 Atl. Rep. 258, and cases cited; Maryland, Smith v. Towers, 14 Atl. Rep. 497.) The two cases just cited are quite recent, the former having been decided in 1887, and the latter in June of the present year. The Supreme Court of the United States in Nichols v. Eaton, 91 U. S. 716, has affirmed the validity of such trusts, and also in a subsequent case—Hyde v. Woods, 94 U. S. 523. The opposite view is taken in several States, and the authority in support of that view will be found in the briefs of counsel. In some States, the validity of such trusts, where the fund proceeds from the bounty of another, is sanctioned by express statutes. This is true of New York, New Jersey, Illinois, and Tennessee. Decisions in those States, therefore, are of no value in the discussion of the question where such statutory provisions are not involved.

THE case of Bradstreet Co. v. Gill, 9 S. W. Rep. 753, recently decided by the Supreme Court of Texas, lays down the law, for that State, in reference to publication of reports by mercantile agencies. It was held that a witness, in possession of a key to the report of the agency, may be permitted to testify as to the meaning of a report in blank, though not as to the general effect it would have upon the business standing of the persons so rated. It was also held, relying upon the authority of Erber v. Dun, 12 Fed. Rep. 530; Sunderlin v. Bradstreet, 46 N. Y. 188, and the more recent case of King v. Patterson, 49 N. J. L. 417, that:

A commercial agency is a lawful business, and, when conducted lawfully, is a benefit to society and trade; but no just reason can be given for a rule that would exempt it from liability for false and defamatory publications, when other citizens would not be exempt. If an individual voluntarily or for profit give false and injurious information to persons interested in the trade and commercial standing of another at the time the information is given, such communications would be privileged; but if he furnishes such information to others not so interested to traders and merchants generally, it is not privileged.

THERE will be found in Anderson v. Bennett, 19 Pac. Rep. 765, lately decided by the Supreme Court of Oregon, a very exhaustive review and discussion of the authorities bearing upon the question of liability of the

master for injuries caused by the negligence of a fellow-servant. The fact here was that the servant, who was guilty of negligence which caused the injury, was a foreman or superintendent of defendant. The court say that the general doctrine that a master is not liable for injuries caused by the negligence of a fellow-servant in the same common employment is now settled law; that the general rule as declared in Farwell v. R. Co., 4 Metc. 49, and other cases following it, has been the subject of much dispute as to its proper limitations, and in many of the States has been relaxed; that the later current of decisions, as well as legislative action, indicates a marked departure from that rule, as to servants clothed with partial authority only, such as a foreman, and the principle upon which such change is based is that when a master delegates any duty, he is liable for its proper performance. The court says:

Guided by this principle, several tests have been applied in determining the line of demarcation between the representative of the master and the mere servant, and among them is the ruling that the master is chargeable for any act of negligence in so far as the servant is charged with the performance of the master's duty to his servants, such as the selection of competent servants, the furnishing of suitable tools and instrumentalities, the providing of a reasonably safe place in which to work, and the observance of such care as will not expose the servant to hazards and perils which may be guarded against by proper diligence, etc.; and to the extent of the discharge of these duties which the master owes to his servant by the middle man or vice principal, the latter stands in the place of master. (Citing Gunter v. Manufacturing Co., 18 S. C. 262; Flike v. Railroad Co., 53 N. Y. 553; Fuller v. Jewett, 80 N. Y. 46.)

THE Supreme Court of Michigan, in the case of Park v. The Detroit Free Press Co., 40 N. W. Rep. 731, has declared unconstitution the libel law of that State, enacted in 1885, providing that in suits brought for the publication of libels, in any newspaper, only such actual damages, as may be proved, can be recovered, if it appear that the publication was made in good faith, and did not involve a criminal charge, and was due to mistake, and that a retraction was published. Section 3 of the act construes "actual damages" to include all damages the plaintiff may show he has suffered in respect to his property, business, trade, profession or occupation. The court, in disregarding the act, proceeds upon the ground that it deprives persons of any adequate remedy for injuries to reputation caused by the publication of a charge involving disgrace, but not technically criminal, that there are many technical crimes involving no infamy and acts not indictable which are utterly disgraceful. The court concludes:

It purports to confine recovery in certain cases against newspapers to what it calls "actual damages," and then defines actual damaages to cover only direct pecuniary loss in certain specified ways, and none other. In some of these defined cases the proof of any damages in this sense would be impracticable, and in all it would be very difficult. They are confined to damages in respect to property, business, trade, profession, or occupation. It is safe to say that such losses cannot be the true damage in a very large share of the worst cases of libel. A woman who is slandered in her chastity is under this law usually without any redress whatever. A man whose income is from fixed investment or salary or official emolument or business not depending upon his repute could lose no money directly unless removed from the title to receive his income by reason of the libel, which could seldom happen. * * * There is no room for holding in a constitutional system that private reputation is any more subject to be removed by statute from full legal protection than life, liberty, or property. It is one of those rights necessary to human society that underlie the whole social scheme of civilization. It is a thing which is more easily injured than restored, and where injury is capable of infinite mischief; and, on the other hand, it is one where the injury is frequently, and perhaps generally, aggravated by malice.

IN Louisville Asphalt Varnish Co. v. Lorick, 8 S. E. Rep. 8, lately decided by the Supreme Court of South Carolina, plaintiff's salesman took defendant's order for goods, reduced it to writing, and mailed it to plaintiff. Upon receipt of this, plaintiff shipped the goods to defendant. Defendant had, in the meantime, written plaintiff not to ship "goods ordered through your salesman," but this was not received until after goods were shipped. Defendant refused to accept the goods, and now defends in a suit by plaintiff, upon the ground that there was no such note or memorandum in writing, as would satisfy the requirements of the statute of frauds. The court says:

It is quite certain that there was no formal agreement in writing, signed by the parties to be charged, for the sale of the goods in question, and we think it equally certain that there was no single instrument or memorandum in writing sufficient to satisfy the requirements of the statute; for the letter of the defendants, copied above, did not specify the necessary particulars as to quantity, nature, and price of the goods which were the subjects of the alleged contract of sale, and the copy of the order sent by the salesman to the plaintiff, which did contain all the necessary particulars, was not signed by the defendants. It plain, therefore, that neither one of these papers,

standing alone, would be sufficient. But as it is well settled that the whole agreement need not appear in a single writing, but may be made out from several instruments or written *memoranda* referring one to the other, and which, when connected together, are found to contain all the necessary elements, the precise, practical question in this case is whether the letter of defendants can be connected with the written order sent by the salesman, so that the two together may constitute a sufficient note or memorandum in wrting to satisfy the requirements of the statute.

After reviewing the authorities (among others, Drury v. Young, 58 Md. 546; Beckwith v. Talbot, 95 U. S. 289; Townsend v. Hargroves, 118 Mass. 325), it is held that the letter of defendant's, taken as it must be, in connection with the order sent to plaintiff by the salesman, to which it expressly referred, and which was in writing, and specified all the necessary particulars, as to price, quantity, quality and time of payment, constituted a sufficient note or memorandum in writing of the bargain to take the case out of the statute. Simpson, C. J., dissented from this opinion, upon the ground that there was an absence of all testimony connecting defendant's letter distinctly and clearly with the memorandum made by plaintiff's agent and sent by him as an order for the goods, so that the two could constitute one memorandum in writing signed by the defendants.

IN State v. Darcy, 16 Atl. Rep. 160, the Supreme Court of New Jersey hold that a mortgage owned by a resident of that State, although made upon land situated in another State, where a tax upon such land has been assessed and paid, within the preceding six months, is taxable there. The act concerning taxes in that State, after reciting that all real or personal estate shall be liable to taxation, in a following section construes the term "personal estate" to include goods and chattels of every description, including, among other things, money debts due or owing from solvent debtors, whether on contract, note, bond, mortgage," etc., whether said personal estate be within or without this State. Another section provides that "stock and other personal estate owned by citizens of this State, situate and being out of this State, upon which taxes shall have been actually assessed and paid within twelve months next before the day prescribed by law for commencing the assessment, shall be exempt from taxation." The insistance was that the mortgage was within the exempted words of the last section, and that it represented property situated within the State of Kansas, upon which taxes had been paid. The court, after reviewing the later cases, King v. Reed, 43 N. J. L. 186; State Tax, etc., 15 Wall. 300, says:

The result deducible from these cases appears to be that the mortgage taxed in the present case had its *situs* in the city of Newark; that there was no legislative provision changing the rule in this respect; and that the taxation of the land upon which it was secured in the State of Kansas cannot be regarded as a taxation of the mortgage, for if so regarded it would be clearly beyond the power of the legislature of Kansas to accomplish. * * * Again, it is claimed that the legislative policy in this State has been averse to the taxation of both the mortgage and the land upon which the mortgage is a lien. It is therefore urged that it must have been the legislative intent to regard a mortgage, and an interest in the land equal to the amount of the mortgage, as identical subjects of taxation in all cases where the statutes speak of property which has paid a tax within twelve months preceding. But, in the absence of expressed words, I do not regard this as a natural inference. Because either the mortgage or the land is relieved from taxation when both are within this State, it does not follow that the legislature intended to apply the same rule when the land is beyond our jurisdiction. We must remember that the legislature recognized a difference between debts owing to domestic and those owing to foreign creditors. While legislative policy permits the former to be deducted from the ratables of the debtor, it takes no cognizance of the former. The policy which permits a reduction for debts is induced by a desire to avoid double taxation; for if the debtor pays taxes for all his property, and is permitted no deduction for the unpaid price of the same property, while the creditor is also taxed for such price, it is double taxation, as obviously as if the price was secured by pledge or a mortgage upon chattels or a mortgage upon lands. A mortgage, while it has features which will justify exceptional legislative treatment, is but a debt secured by a lien upon land, and, unless the legislative intent is plain to otherwise regard it, the credit is the thing which taxation reaches.

INTOXICATING LIQUORS — SOME CASES OF PLEADING, EVIDENCE AND ASSOCIATIONS.

PLEADING.—The Intent.
" Negative Averment.
" Following the Statute.
" Special Acts.
" License Need Not be Negatived.
" Name of Person.
" *Continuendo.*
" Habit of Getting Intoxicated.
" Alternative Averments.
" Joint Indictment.
" Civil Action Under Statute.
EVIDENCE.—Allegations, When to be Proven; Variance.
" Intemperate Habits: Knowledge of Seller.

EVIDENCE.—Selling or Giving Away, Two Offenses; Variance.
" Presumption as to Sale From Course of Dealing.
" Evidence as to the Time.
" Intoxicating Character of Liquors; Judicial Notice.
" Non-expert Evidence.
" Chemical Analysis of Beer of Same Name.
" Sale; Character and Sufficiency of Evidence.
" License; Burden of Proof.
" Private Instructions.
" Detective; Cross-examination.
" Reading Standard Works to the Jury.
" Minor Evidence as to Age.
" Purchaser, When Required to Testify.
" Associations and Clubs; Who Liable.

The cases collated in this article elucidate some of the leading principles under the general law relating to intoxicating liquors.

PLEADING—*The Intent* should be averred if an element of the offense created by law, otherwise where the law is silent as to the intent.[1] But where an indictment was brought under a statute prohibiting in the first clause the sale of intoxicating liquors, to minors with certain exceptions and in the latter clause the sale to any person in the habit of getting intoxicated, it was held that it was not necessary to aver a *scienter*. It is enough that the sales were illegally made in violation of the statute whether the seller knew or did not know at the time that the person to whom he sold was or was not a minor or an habitual drunkard. The sale is made at the peril of the licensee.[2]

Negative Averment.—In Alabama, upon a question of the sufficiency of an indictment for selling to a person of known intemperate habits, it has been decided that it is not necessary to aver that the gift or sale was made without the requisition of a physician, such requisition being a statutory prerequisite for a legal sale to such person.[3] But an indictment under a statute making it unlawful for any person to distill grain into spirituous liquor, "unless employed or authorized by the governor so to do," is fatally defective if it fails to aver that the defendant was not authorized or employed by the governor.[4] And in Arkansas, the rule prevails that an indictment under a statute requiring a prescription or recommendation therefor by a regular practicing or graduated physician should have *negatived* a prescription or recommendation by a "graduated physician," in addition to the words "without a prescription therefor by a regular practicing physician."[5]

Following the Statute.—Where the indictment although not employing all the terms and language of the statute, yet sets forth the statutory offense so plainly that the jury can understand its nature, it is sufficiently correct; it must conform to the statute but need not pursue it literally.[6]

Special Acts require greater particularity, therefor an indictment for a violation of a special act must be framed with special reference to, and must conform to the letter and substance thereof, or must state the facts which constitute the offense created by it.[7]

License Need Not be Negatived.—Where the statute imposes a penalty for selling without a license, it is not necessary to allege the want of a license.[8]

Name of Person.—In Mississippi, it is held that it is not necessary to allege the name of the person to whom the liquor was sold.[9]

In Arkansas, an indictment under a statute providing that every person who shall on Sunday sell or retail any spirits or wine shall be guilty, etc., was declared insufficient because it failed to set out the names of the persons to whom the liquor was sold, or that they were sold to some person to the jurors unknown.[10] And in Dakota, we have the broad ruling that it is unnecessary to describe the premises, person or the quality, or kind of liquor sold.[11]

[1] McCutcheon v. People, 69 Ill. 601.

[2] Mapes v. People, 69 Ill. 523; Barnes v. State, 19 Conn. 397. Upon sufficiency of averment as to "habit of getting intoxicated," see Wiedeman v. People, 92 Ill. 314.

[3] Tatum v. State, 63 Ala. 147.

[4] Davis v. State, 39 Ala. 521.

[5] Thompson v. State, 37 Ark. 408. But see Jefferson v. People, 101 N. Y. 19, cited *post note*, 8.

[6] Loeb v. State, 75 Ga. 262; Snider v. State, 59 Ala. 65; McPherson v. State, 54 Ala. 221; Espy v. State, 47 Ala. 533. *Place of Sale.*—As to when place of sale must be averred where indictment is for engaging in retailing without a license, see Harris v. State, 50 Ala. 127. As to what is sufficient averment of use of room for illegal sale, see State v. Ruby, 68 Me. 543.

[7] Camp v. State, 27 Ala. 53.

[8] Jefferson v. People, 101 N. Y. 19; Com. v. Brusie, (Mass. 1887), 5 N. E. Rep. 119. But see Thompson v. State, 37 Ark. 408, cited *ante note*, 5.

[9] Lea v. State, 1 South. Rep. 51.

[10] State v. Parnell, 16 Ark. 506, citing State v. Munger, 15 Vt. 290; People v. Adams, 17 Wend. 475; Com. v. Smith, 1 Gratt. 553; Com. v. Dove, 2 Va. Cas. 26; Ells v. People, 4 Scam. 508.

[11] People v. Sweetzer, 1 Dakota, 308, citing United States v. Holliday, and United States v. Haas, 3 Wall

But where a *special statute* prohibited the sale within certain specified limits of any spirituous etc., liquors, "in any quantities, large or small, to any person or persons whatsoever," it was declared that the name of the person to whom the liquor was sold must be specified or the person must be otherwise described.[12]

Continuendo.—In an indictment for keeping liquor for sale illegally, the averment may be with a *continuendo.*[13]

Habit of Getting Intoxicated.—It is held in Illinois, that an averment of unlawful sale of intoxicating liquors, "to one C who was in the habit of getting intoxicated," is not sufficiently certain in that it fails to aver that the person to whom the sale was effected was then at the time of the sale in the habit of getting intoxicated.[14]

Alternative Averments are not sufficient.[15] So where an offense charged in the alternative that the defendant "did sell or give away whisky," when the statute makes it an offense to sell, lend, or give it away, is bad for uncertainty, though an averment that the defendant "did sell and give away" is good, so also an averment that one sold whisky or brandy is bad, but an averment that one sold whisky and brandy is good.[16]

Joint Indictment.—It is held in Alabama, that where two persons are indicted jointly for the same offense, if the proof shows the commission of the offense severally by each, there can be no conviction of either or both.[17]

Civil Action Under Statute; Pleadings.—Where an action was brought under a statute to recover for an injury sustained by the appellee by reason of sales made by appellant to her husband, it was held that an allegation of sales made to him causing him to become an habitual drunkard and a consequent injury therefrom was sufficient.[18]

EVIDENCE—*Allegations When to be Proven; Variance.* — Material allegations must in general be proved as laid, although there are exceptions to this rule, but a *videlicet* will not avoid variance or dispense with exact proof; and the proof need not precisely conform with the allegations in every particular, it is sufficient if it agrees in substance. Therefore an averment of the sale of whisky is held to be sustained by proof of a sale of spirituous liquors.[19] But where the averment was that the defendant sold whisky without a license, it was held that evidence of the sale of "bitters" was irrelevant, unless shown to be made of whisky.[20] Though where the statutory words were "any brandy, rum or other spirituous liquors," it was held that the allegation of a sale of spirituous liquors was sufficiently certain, and that proof of a sale of brandy only would support such an indictment.[21] Allegations, however, which are immaterial need not be proven.[22] And in general, under an averment of "sale," all facts necessary to constitute one may be shown.[23]

Intemperate Habits; Knowledge of Seller.—As showing that the defendant knew of the "intemperate habits" of the person to whom he sold liquor, evidence is competent that such person was in the habit of drinking liquors daily, frequently and openly, so as to become intoxicated, in the community where defendant lived, and that he was accustomed to obtain liquors there both of defendant and others,[24] although it is held in Illinois that the habit of getting intoxicated may not be implied from the habit of drinking intemperately,[25] nor is drunkenness necessarily implied by intemperance.[26] But in regard to the "habit of getting intoxicated" it is held that knowledge of such fact on the part of

407; State v. Adams, 17 Wend. 475; Osgood v. People, 39 N. Y. 449; State v. Gumman, 22 Wis. 422; State v. Rice, 38 Ill. 435; Commr. v. Baird, 4 S. & R. 141.

[12] Dorman v. State, 34 Ala. 216, and cases cited.

[13] Commr. v. Hersey, (Mass.) 9 N. E. Rep. 837.

[14] Wiedeman v. People, 92 Ill. 314.

[15] Raister v. State, 55 Ala. 64.

[16] Thompson v. State, 37 Ark. 408. When duplicity in complaint is not to be considered, see State v. Dolan, 69 Me. 573.

[17] Johnson v. State, 44 Ala. 414.

[18] Brannon v. Silvermail, 81 Ill. 434. So in an action under a statute for damages caused by one K, an intoxicated person, an averment that the defendants were in the liquor business, the sale to K, K's intoxication, the assault, and direct infliction of the injury, were held sufficient: King v. Haley, 86 Ill. 106.

[19] Bruguier v. United States, 1 Dakota, 5, citing United States v. Lancaster, 5 Wheat. 434; State v. Davidson, 12 Vt. 300; State v. Bugbee, 22 Vt. 32.

[20] Williams v. State, 35 Ark. 430.

[21] Commonwealth v. Odlin, 23 Pick. 275. And see Commonwealth v. White, 10 Met. 14.

[22] Schroeder v. Crawford, 94 Ill. 357.

[23] People v. Sweetzer, 1 Dakota, 308, citing Divine v. State, 4 Ind. 240; Clare v. State, 5 Iowa, 509; Wrocklege v. State, 1 Iowa, 167, and other cases.

[24] Atkins v. State, 60 Ala. 45, and see "non-expert evidence" herein, *post.*

[25] Mullinix v. People, 76 Ill. 211.

[26] *Id.*

the seller is immaterial.[27] Again, where the action was brought under a statute for selling to one who was then and there in the habit of getting intoxicated, it was held that it was not necessary that the habit be a "fixed habit," since the statute used simply the word habit, and the definition given by Webster properly applied, that is, "the involuntary tendency to become intoxicated which is acquired by frequent repetition," and inasmuch as the evidence showed that the person to whom the sales were made had been drunk from three to five times within two years prior to the trial, this did not authorize the court to say that the jury did not properly find that the habit of getting intoxicated existed. The court said that "a man having full knowledge of his appetite could hardly be supposed to be guilty of such excess;" and it was further held that the evidence need not show, beyond a reasonable doubt, a constant and usual habit of getting intoxicated, but it was sufficient to prove that involuntary tendency to become intoxicated which is acquired by frequent repetition. It would seem, however, that so much of this decision as determines that the jury might properly find that the habit of getting intoxicated existed in the case of a person who had only been guilty of an excess to the extent of getting drunk from three to five times in two years, is not strictly in keeping with the definition of Webster on which it is based, unless the words of that definition are capable of a much broader and more liberal interpretation, than appears upon their face.[28]

Selling or Giving Away; Two Offenses; Variance.—Where, under a statute, it is a criminal offense to sell or give away intoxicating liquors to one in the habit of getting intoxicated, it is held in Illinois that these constitute two offenses, in that an indictment for one offense will not be sustained by proof of the other.[29]

Presumption as to Sale From Course of Dealing. — Evidence that a party obtained liquor at defendant's tippling house on various occasions, without any statement that he bought it, is sufficient to warrant an inference of a sale, from the course of dealing at such places. In this case the court said: "The presumption is that when liquor is furnished there, it is for a consideration and that whether the customer pays cash or not he becomes liable, at least impliedly for the price of what is ordered and consumed on the spot," and that this presumption is conclusive unless rebutted.[30]

Evidence as to the Time.—Where an indictment was brought under a statute for maintaining a common nuisance for the illegal keeping and sale of intoxicating liquors on a day stated therein, it was held that the prosecution might show that on a particular day, some eight weeks prior to the day alleged, the defendant had been seen at the house in question, and had then sold liquor at said place, and that thereafter and before the day stated in the indictment the defendant had been seen to go in and out of the place several times.[31] So where an indictment was brought for keeping and maintaining a place used for illegal sale and illegal keeping of liquors on certain specified days, and on divers other days between said specified times, it was held competent to show that the nuisance was kept during any of the time alleged.[32]

Intoxicating Character of Liquors; Judicial Notice.—It is held in Alabama, that the court will take judicial notice of the meaning of the word "malt liquor," found in a statute prohibiting its sale, and that the definition thereof as contained in Webster's Unabridged Dictionary may properly be given in a charge to the jury, or read to them in evidence. The work is such a standard authority as to the meaning of the words as to be among the facts judicially known.[33] And in New York, it is decided that the courts will take judicial notice that whisky, brandy, gin ale or strong beer are intoxicating,[34] although it is there said that courts will not take judicial notice that lager beer is intoxicating, but will submit the question upon the evidence to the jury.[35]

[27] Humpeler v. People, 92 Ill. 401.
[28] Murphy v. People, 90 Ill. 59.
[29] Humpeler v. People 91 Ill. 401.
[30] Loeb v. State, 75 Ga. 261, 262.
[31] Commonwealth v. Kelley, 116 Mass. 341, citing Commonwealth v. Stoehr, 109 Mass. 365; Commonwealth v. Dearborn, *id.* 368.
[32] Commonwealth v. Hersey, 9 N. Eng. Rep. 838.
[33] Weed v. State, 55 Ala. 16.
[34] Rau v. People, 63 N. Y. 279.
[35] *Id.* "Strong beer" is held to be "strong and spirituous liquor" in Commissioners of Excise v. Taylor, 21 N. Y. 173. See distinction made as to difference between "fermented beer" and "beer." *Id.* As to lager beer, that court will not judicially notice. See

Non-expert Evidence.—It is not necessary that one be an expert to enable him to testify that a particular article is gin, it being a matter of common knowledge.[36] So a witness who has frequently drank fermented liquors and who can distinguish them by their taste, though he has no special knowledge of chemistry, is competent to express an opinion on the question whether lager beer is or not a fermented liquor.[37] And it is held that a person having knowledge of the general character of the person to whom the liquor was sold may testify whether his intemperate habits were generally known or not in the community.[38]

Chemical Analysis of Beer of Same Name.—It is decided in Commonwealth v. Goodman,[39] in order to show the intoxicating properties of the beer sold by defendant, that evidence may be given of a chemical analysis of beer of the same name and similar in color, flavor, and strength as that found on the defendant's premises.

Sale; Character and Sufficiency of Evidence.—It was held in Commonwealth v. Campbell,[40] that "the fact that a person sells liquor at a given place may be proved by circumstantial evidence. The manner in which the place was fitted up, the furniture and liquors found there. The number of persons about the premises, the character and condition of the persons so found, are all of them circumstances having a tendency to show that on the occasion in question the defendant was engaged in the sale of liquors."[41] So upon a complaint for search and seizure "bottles, glasses, and measures, identified as found in the defendant's shop," were held to be admissible in evidence, and the court said: "They were or might be implements used in unlawful traffic. They were admissible in evidence, however obtained. Their evidentiary force was for the jury. They are nevertheless articles of evidence, even if procured by an unauthorized and illegal search."[42] And evidence is admissible that certain empty jugs found at the defendant's house had recently contained liquor, the indictment being for unlawfully keeping with intent to sell.[43] So it may be shown that liquors were found in the bed-room of the defendant which was located in an upper story over the defendant's eating saloon and connected with it by an elevator.[44] And evidence that liquor was found in outbuildings on the premises of the defendant, and that an attempt had been made by him to deceive the witness in regard to them, is competent on the question of illegal sale and keeping.[45] But upon a charge of keeping liquors for sale contrary to law, it appeared in evidence that there was found in a cellar of the defendant's house, bottles and demijohns, also a barrel and a bottle of whisky, and a barrel of rum; that the barrel of whisky was standing on the head and there was no evidence that it had been tapped or used. The barrel of rum had a faucet in it, was nearly full and was lying on the side in a frame. In a sink in a room over the basement were found tumblers such as are ordinarily used in a bar room and some orange peel, upon these facts the court held that the "possession and use of intoxicating liquors are not prohibited by statute;" that the "intent to sell contrary to law, in which the whole criminality of the keeping consists must be proved beyond a reasonable doubt;" that the facts were "too scanty to furnish any of the elements of certainty beyond a reasonable doubt," and therefore the evidence was insufficient in itself to warrant a conviction.[46] In Pierce v. State,[47] the accused kept an hotel to which a saloon was attached. The saloon was devoted exclusively to the bar business. It did not appear that the hotel business necessitated its being kept open on Sunday. The saloon and liquors therein were kept by and were the

note, p. 178, *id*, citing Rau v. People, 63 N. Y. 277; People v. Zeiger, 6 Park. 355; People v. Hart. 24 How. Pr. 289; Josephdaffer v. State, 32 Ind. 402.

[36] Commonwealth v. Timothy, 8 Gray, 480.
Merkle v. State, 37 Ala. 139.
Tatum v. State, 63 Ala. 147. *Contra:* Stanley v. State, 26 Ala. 26.

[39] 97 Mass. 119.

[40] 116 Mass. 32.

[41] Citing Commonwealth v. Stone, 97 Mass. 548; Commonwealth v. Berry, 109 Mass. 366. And see Commonwealth v. Cogan, 107 Mass. 212; Commonwealth v. Pierce, *id.* 487.

[42] State v. Burrough, 72 Me. 479, citing State v. Plunket, 64 Me. 536; State v. McGlynn, 34 N. H. 422; State v. Flynn, 36 N. H. 64; Commonwealth v. Dana, 3 Met. 329.

[43] Commonwealth v. Timothy, 8 Gray, 481.

[44] Commonwealth v. Kinsley, 108 Mass. 24.

[45] Commonwealth v. Doe, 108 *id.* 418.

[46] Commonwealth v. Intoxicating Liquors, 105 Mass. 595. But see cases *ante*, and Commonwealth v. Gafley, 122 *id.* 334; Commonwealth v. Levy, 126 *id.* 240; Commonwealth v. Kennedy, 97 *id.* 224.

[47] 109 Ind. 535.

defendant's property. The evidence showed that the witness went into the hotel office on Sunday and from there into the saloon, where he found two or three persons, but neither the hotel proprietor nor his clerk were there or in the office. One of the persons in the saloon was a boarder, of whom the witness asked if he had any beer, he replied "there is a bottle why don't you take it." The bottle referred to, together with a glass, was on the counter; the witness poured a glass of beer out of the bottle, drank the same, placed five cents on the counter and left. There was no evidence that this occurred with the defendant's consent and knowledge other than as shown by the above facts. The statute made it an offense to sell beer or give away any intoxicating liquor to be drank on Sunday. It was held that the defendant was properly convicted in the court below. Again, to support an indictment for keeping and maintaining a tenant for illegal sale of intoxicating liquors, a printed card containing the defendant's name, the location of her place of business and the words "dealer in imported wines and liquors," also the words "porter and lager beer" was offered by the prosecutor, coupled with the statement of the witness producing the same, that a few days before the trial in October, 1875, the defendant then told him it was her card and that she had had the same printed the year before. It was permitted to be read as showing that on May 1st, 1875, the day alleged in the complaint, the defendant was the keeper of the house in question. It was held that the evidence was competent and was properly admitted.[48] And proof of the sale of an article called "pop," shown on the trial to be malt liquor which possessed intoxicating qualities and would intoxicate if a sufficient quantity were taken, and that the same tasted like poor beer and was drawn from beer kegs, is sufficient to warrant the jury in finding the defendant guilty of the sale of intoxicating liquors without a license.[49] In Commonwealth v. Dowdican,[50] evidence that the witness had seen the defendant "selling whisky" within the time covered by the indictment, and that the contents of a tumbler looked like whisky, was held admissible, and the prosecution was permitted to ask the same witness "what was in the tumbler" and was also permitted to ask the witness in what condition he had seen people there, and the witness was allowed to answer that he had seen them going in sober and coming out drunk.[51] Again, a certified copy of a record of a deputy collector of the United States internal revenue, showing that the defendants paid a special tax as liquor dealers, during the period covered by the indictment was declared to be competent evidence.[52]

License; Burden of Proof.—It is decided, in United States v. Nelson,[53] that the accused is bound to prove a license when the fact is peculiarly within his knowledge, and this is so, although there is no negative averment of his having a license.[54] So where the acts charged and put in evidence were of sales of intoxicating liquors to be drank upon the premises where sold, and it appeared that the defendant had a license from the authorities of the town in which his place was located, as a druggist, which expressly prohibited the sale by him or his agents of intoxicating liquors to be drank on the premises or in his place of business, and the ordinance under which the license was granted provided that the corporation might grant such licenses to drug stores upon the payment of a certain sum; it was held that, in order to avail himself of such license as a defense, the defendant must show that it was broad enough to cover the acts as alleged and proved, that failing in this he was liable.[55]

Private Instructions. — Where the statute provides that whoever by himself, clerk or servant shall sell etc., the evidence being that the defendant kept intoxicating liquors for sale, he may not limit his responsibility for sales made by his clerk by showing what

[48] Commonwealth v. Thomley, 119 Mass. 104.

[49] Godfriedson v. People, 88 Ill. 285.

[50] 114 Mass. 257.

[51] So a witness may testify that he has heard parties call for whisky in the defendant's saloon, and that defendant had thereupon poured something into a tumbler, which the person calling for whisky had drunk, and that the color was reddish, the complaint being of keeping a tenement used for the illegal sale of intoxicating liquors. Commonwealth v. Owens, 114 Mass. 252. See also Commonwealth v. O'Donnell, 9 N. Eng. Rep. 509; Mason v. Lothrop, 7 Gray, 354.

[52] State v. Wiggins, 72 Me. 425.

[53] 29 Fed. Rep. 202.

[54] See also State v. Back (Minn.), 30 N. W. Rep. 764; Commonwealth v. Rafferty, 133 Mass. 574; Commonwealth v. Carpenter, 100 *id.* 204; Commonwealth v. Shea, 115 *id.* 102; Commonwealth v. Dean, 110 *id.* 357.

[55] Spoke v. People, 89 Ill. 617; Prather v. People, 85 Ill. 36, distinguished.

instructions he had given him in regard to such sales.[56] So private instructions to a clerk or bar-keeper regarding selling to minors were held irrelevant and properly excluded in Loeb v. State.[57]

Detective; Cross-examination.—It was decided, in State v. Rollins,[58] that a witness in a liquor case, having testified that he was employed as a detective, might not be asked upon cross-examination as to who employed him, such question being entirely irrelevant, and one which might properly be excluded.

Reading Standard Works to the Jury.—In Alabama, it has been held no error to permit State to read the jury extracts from a standard medical work on the subjects of vinious and fermented liquors.[59]

Minor; Evidence as to Age.—A minor is a competent witness to his own age, although his only knowledge thereof is obtained from the date of his birth in the family Bible, or his information may have been derived from some other source.[60] And the uncle of a minor, to whom the sale of liquor was made who had known him from early infancy, may testify that he does not from his knowledge of him believe him to be of age, and such evidence is not open to objection as secondary evidence, although the minor's parents could have been had as witnesses but were not.[61] So a witness who has testified to the dress, manner, and appearance of the person to whom the sale was made may then give his opinion as to the age of that person.[62]

Purchaser; When Required to Testify.—A purchaser of liquors may be required to testify as to whether the defendant had sold him liquors, since such evidence would not tend to criminate or bring him into disgrace, within the meaning of the law.[63]

Associations and Clubs; Who Liable.—The Revised Statutes of Illinois 1874, ch. 43, sec. 2 of the "dram-shop" act makes it unlawful for any person not having a license to keep a dram-shop either by himself or another, or to sell intoxicating liquors of any kind in less quantity than one gallon, or in any quantity to be drank on the premises, or in any adjacent room, etc., providing a penalty for a violation thereof. *Held*, that any person who, without a license to keep a dram-shop, sells or gives away the same in less quantity than one gallon, or in any quantity to be drank on the premises, or in any adjacent room or place, or who resorts to any shift or device to evade the law, is guilty of unlawful selling, and is liable therefor. In this case an association was formed with the declared object of promoting "temperance, friendship and good feelings in the community at large," and had a president, vice president, secretary and treasurer with defined duties, and it also had a capital stock of three hundred dollars. The object and purposes of the association, were not set forth in either its articles of association or by-laws. Prior to its formation the defendant was licensed to and did keep a dram-shop. At the time of the formation of the association it claimed to have purchased the same, together with the liquors, etc., therein, of the defendant, whom they elected as treasurer. Any person could become a member upon the payment of one dollar, for which sum he received a ticket with figures thereon from one to twenty inclusive. With this ticket beer, whisky, cigars etc., could be purchased and certain numbers corresponding to the price of the thing were thereupon punched out of the ticket by the treasurer. The business was continued in this way without any license for about three months, during which time the treasurer had the entire management of the business, purchasing and replenishing the stock when necessary and paying the bills, nor was an account thereof kept with the association nor distribution of profits made to the members. At the time of the prosecution the members numbered about three hundred. It was held to be clearly a shift or device to evade the provisions of the law, and that whatever sales or gifts of liquor were made under the arrangement constituted "unlawful selling," and that the treasurer was liable therefor; and if, as a matter of law, the liquors were owned by the company as partnership property and the liquors so purchased were given or retailed out to the several members by the company, they having no license, this would

[56] Moecher v. People, 91 Ill. 494.
[57] 75 Ga. 258.
[58] 77 Me. 380.
[59] Merkle v. State, 37 Ala. 139. See Weed v. State, 55 Ala. 16.
[60] Pounders v. State, 37 Ark. 399; Edgar v. State, *id.* 219.
[61] Weed v. State, 55 Ala. 13. See Marshall v. State, 49 *id.* 21.
[62] Commonwealth v. O'Brien, 134 Mass. 200, citing Commonwealth v. Sturtevant, 117 *id.* 122, 133.
[63] Commonwealth v. Kimball, 24 Pick. 369.

be an unlawful enterprise, and all the members would be guilty of a violation of the statute.[64] In a Massachusetts case, the club was organized with limited and selected members and duly elected officers, the purpose being to furnish refreshments to those who belonged to it. A steward was employed at a monthly salary, and a sum was also paid him for the use of the room where the liquors found were kept. In addition to an admission fee of one dollar, paid by each member, checks were issued to the members, each representing a value of five cents. The income from these sources was used in purchasing liquors which were used in common by the club. The defendant, as steward, was obliged to furnish members checks in such amounts at five cents each as were desired. It was also his duty to take care of and furnish to the members liquors for drinking, in such quantities as were demanded, and to receive payment in checks therefor when delivered. The liquors seized were in the custody of the steward who had formerly held a license to sell, to be drunk on the premises. No license was held by him at the time of the seizure, and the town in which the liquors were found had voted to grant licenses for the sale of intoxicating liquors. The defendant was found guilty, and the case was carried by consent to the supreme court for determination. The court declared that the legislature "prohibited the selling or exposing or keeping for sale spirituous or intoxicating liquor," except in the manner provided by statute, that it had "not undertaken to prohibit the drinking or buying of intoxicating liquors, or the distribution of it in severalty among persons who own it common. If, therefore, two or more persons unite in buying intoxicating liquor, and then distribute it among themselves, they do not violate the statute, and the intent with which they do this is immaterial;" and again, "If a club were really formed solely or namely for the purpose of furnishing intoxicating liquors to its members, any person could become a member by purchasing tickets which would entitle the holder to receive such intoxicating liquors as he called for upon a valuation determined by the club, the organization itself might show that it was the intention to sell intoxicating liquors to any person who offered to buy, and the sale of what might be called a temporary membership in the club with a sale of the liquors would not substantially change the character of the transaction. One inquiry always is, whether the organization is *bona fide* a club with limited membership into which admission cannot be obtained by any person at his pleasure, and in which the property is actually owned in common with the mutual rights and obligations which belong to such common ownership under the constitution and rules of the club, or whether either the form of a club has been adopted for other purposes, with the intention and understanding that the mutual rights and obligations of the members shall not be such as the organization purports to create, or a mere name has been assumed without any real organization behind it."[65]

It is said in this case that "the evasion of the law intended in Commonwealth v. Smith,[66] is an evasion by means of a form or device which is apparently legal, while the subtance of what is done is within the prohibition of the statute."[67]

JOSEPH A. JOYCE.

[64] Rickart v. People, 79 Ill. 85.

[65] Commonwealth v. Pomphret, 137 Mass. 564.

[66] 102 Mass. 144.

[67] *Id.* page 566. Cases cited in support of the main case are: Graff v. Evans, 8 Q. B. Div. 373; Seim v. State, 55 Md. 566; Rickart v. People, 79 Ill. 85, explained; Marmont v. State, 48 Ind. 21, distinguished; State v. Mercer, 32 Iowa, 405, distinguished; Martin v. State, 59 Ala. 34.

CONSTITUTIONAL LAW — INTERSTATE COMMERCE — LICENSING ENGINEERS — DUE PROCESS OF LAW — CRIMINAL LAW — PLACE OF TRIAL.

NASHVILLE, ETC. R. CO. V. ALABAMA.

United States Supreme Court, October 22, 1888.

1. *Constitutional Law — Interstate Commerce — Licensing Engineers.*—Act Ala., June 1, 1887, providing that engineers and other railroad employees shall be examined by a medical board, to determine whether or not they are "color-blind," imposing the expense thereof on the company employing them, and making their employment penal unless they have certificates of fitness, is not repugnant to the power vested in congress to regulate commerce, as applied to a railway company having its lines, on which the engineer runs, in different States.

2. *Same—Due Process of Law.*—Nor does the provision therein, requiring the company to pay the examination fees, deprive the company of property without due process of law, in violation of Const. U. S., 14th amend.

3. *Same — Criminal Law — Place of Trial.* — The

provision of Const. U. S., art. 3, that trials of all crimes shall be in the State where committed, applies only to trials in the federal courts.

Mr. Justice FIELD, delivered the opinion of the court:

A statute of Alabama which took effect on the 1st of June, 1887, "for the protection of the traveling public against accidents caused by color-blindness and defective vision," declares that all persons afflicted with color-blindness and loss of visual power, to the extent therein defined, are "disqualified from serving on railroad lines within the State in the capacity of locomotive engineer, fireman, train conductor, brakeman, station agent, switchman, flag-man, gate-tender, or signal-man, or in any other position which requires the use or discrimination of form or color signals;" and makes it a misdemeanor, punishable by fine of not less than ten nor more than fifty dollars for each offense, for a person to serve in any of the capacities mentioned without having obtained a certificate of fitness for his position in accordance with the provisions of the act. It provides for the appointment by the governor of a suitable number of qualified medical men throughout the State to carry the law into effect, and for the examination by them of persons to be employed in any of the capacities mentioned; prescribes rules to govern the action of the examiners; and allows them a fee of three dollars for the examination of each person. It declares that re-examinations shall be made once in every five years, and whenever sickness, or fever, or accidents calculated to affect the visual organs have occurred to the parties, or a majority of the board may direct; that the examinations and re-examinations shall be made at the expense of the railroad companies; and that it shall be a misdemeanor, punishable by a fine of not less than fifty nor more than five hundred dollars for each offense, for any such company to employ a person, in any of the capacities mentioned, who does not possess a certificate of fitness therefor from the examiners in so far as color-blindness and the visual organs are concerned. The defendant, the Nashville, Chattanooga & St. Louis Railway Company, is a corporation created under the laws of Tennessee, and runs its trains from Nashville, in that State, to various points in other States; 24 miles of its line being in Alabama, 2 miles in Georgia, 7 in Kentucky, and 464 in Tennessee. On the 2d of August, 1887, one James Moore was employed by the company as a train conductor on its road, and acted in that capacity, in the county of Jackson, in Alabama, without having obtained a certificate of his fitness so far as color-blindness and visual powers were concerned, in accordance with the law of that State. For this employment the company was indicted in the circuit court of the State for Jackson county, under the statute mentioned, and on its plea of not guilty was convicted, and fined $50. On appeal to the supreme court of the State the judgment was affirmed, and to review it the case is brought in error to this court.

It was contended in the court below, among other things, that the statute of Alabama was repugnant to the power vested in congress to regulate commerce among the States, and that it violated the clause of the fifth amendment which declares that no person shall be deprived of his property without due process of law. The same positions are urged in this court, with the further position that the statute is in conflict with the clause in the third article of the constitution which provides that the trials of all crimes shall be held in the State where they were committed. The first question thus presented is covered by the decision of this court rendered at the last term in Smith v. Alabama, 124 U. S. 465, 8 S. C. Rep. 564. In that case the law adjudged to be valid required, as a condition for a person to act as an engineer of a railroad train in that State, that he should be examined as to his qualifications by a board appointed for that purpose, and licensed if satisfied as to his qualifications, and made it a misdemeanor for any one to act as engineer who violated its provisions. The act now under consideration only requires an examination and license of parties, to be employed on railroads in certain specific capacities, with reference to one particular qualification, that relating to his visual organs; but this limitation does not affect the application of the decision. If the State could lawfully require an examination as to the general fitness of a person to be employed on a railway, it could of course lawfully require an examination as to his fitness in some one particular. Color-blindness is a defect of a vital character in railway employees in the various capacities mentioned. Ready and accurate perception by them of colors, and discrimination between them, are essential to safety of the trains, and of course of the passengers and property they carry. It is generally by signals of different colors, to each of which a separate and distinct meaning is attached, that the movement of trains is directed. Their starting, their stopping, their speed, the condition of switches, the approach of other trains, and the tracks in such case which each should take, are governed by them. Defects of vision in such cases on the part of any one employed may lead to fatal results. Color-blindness, by which is meant either an imperfect perception of colors, or an inability to recognize them at all, or to distinguish between colors, or between some of them, is a defect much more common than is generally supposed. Medical treatises of recognized merit on the subject represent, as the result of extended examinations, that a fraction over 4 per cent. of males are color-blind. With some the defect is congential, with others brought on by occupations in which they have been engaged, or by vicious habits in the use of liquors or food in which they have indulged. It presents itself in a great variety of forms, from an imperfect perception of colors to absolute inabillity to recognize them at all. Such being the proportion of males thus affected, it is a matter of the greatest importance

to safe railroad transportation of persons and property that strict examination be made as to the existence of this defect in persons seeking employment on railroads in any of the capacities mentioned. It is conceded that the power of congress to regulate interstate commerce is plenary; that, as incident to it, congress may legislate as to the qualifications, duties, and liabilities of employees and others on railway trains engaged in that commerce; and that such legislation will supersede any State action on the subject. But, until such legislation is had, it is clearly within the competency of the States to provide against accidents on trains while within their limits. Indeed, it is a principle fully recognized by decisions of State and federal courts that, wherever there is any business in which, either from the products created or the instrumentalities used, there is danger to life or property, it is not only within the power of the States, but it is among their plain duties to make provision against accidents likely to follow in such business, so that the dangers attending it may be guarded against so far as is practicable.

In Smith v. Alabama this court, recognizing previous decisions where it had been held that it was competent for the State to provide redress for wrongs done and injuries committed on its citizens by parties engaged in the business of interstate commerce, notwithstanding the power of congress over those subjects, very pertinently inquired: "What is there to forbid the State, in the further exercise of the same jurisdiction, to prescribe the precautions and safeguards foreseen to be necessary and proper to prevent by anticipation those wrongs and injuries which, after they have been inflicted, it is admitted the State has power to redress and punish? If the State has power to secure to passengers conveyed by common carriers in their vehicles of transportation a right of action for the recovery of damages occasioned by the negligence of the carrier in not providing safe and suitable vehicles, or employees of sufficient skill and knowledge, or in not properly conducting and managing the act of transportation, why may not the State also impose, on behalf of the public, as additional means of prevention, penalties for the non-observance of these precautions? Why may it not define and declare what particular things shall be done and observed by such a carrier in order to insure the safety of the persons and things he carries, or of the persons and property of others liable to be affected by them?" Of course, but one answer can be made to these inquiries; for clearly what the State may punish or afford redress for, when done, it may seek by proper precautions in advance to prevent. And the court in that case held that the provisions in the statute of Alabama were not strictly regulations of interstate commerce, but parts of that body of the local law which governs the relation between carriers of passengers and merchandise and the public who employ them, which are not displaced until they come in conflict with an express enactment of congress in the exercise of its power over commerce; and that, until so displaced, they remain as the law governing carriers in the discharge of their obligations, whether engaged in purely internal commerce of the State, or in commerce among the States. The same observations may be made with respect to the provisions of the State law for the examination of parties to be employed on railways with respect to their powers of vision. Such legislation is not directed against commerce, and only affects it incidentally, and therefore cannot be called, within the meaning of the constitution, a regulation of commerce. As said in Sherlock v. Alling, 93 U. S. 99, 104, legislation by a State of that character, "relating to the rights, duties, and liabilities of citizens, and only indirectly and remotely affecting the operations of commerce, is of obligatory force upon citizens within its territorial jurisdiction, whether on land or water, or engaged in commerce, foreign or interstate, or in any other pursuit." In our judgment the statute of Alabama under consideration falls within this class.

The second position of the plaintiff in error, that the State statute is repugnant to the provision of article 3 of the constitution which declares that the trial of all crimes shall be held in the State where they have been committed, is readily disposed of. The provision has reference only to trials in the federal courts; it has no application to trials in the State courts.

As to the third position of the plaintiff in error, assuming that counsel intended to rely upon the fourteenth instead of the fifth amendment (as the latter only applies a limit to federal authority, not restricting the powers of the State), we do not think it tenable. Barron v. Baltimore, 7 Pet. 243; Livingston v. Moore, *Id.* 469. Requiring railroad companies to pay the fees allowed for the examination of parties who are to serve on their railroads in one of the capacities mentioned, is not depriving them of property without due process of law. It is merely imposing upon them the expenses necessary to ascertain whether their employees possess the physical qualifications required by law. Judgment affirmed.

NOTE.—The law requiring an examination of engineers, and the procurement by them of a license before entering railway service, is an enactment in the right direction, and the example of Alabama should be followed by every State. There seems to be no doubt of the power as well as of the propriety of such requirements by the State.

The statutes most analagous to the State engineer law in Alabama, are probably those requiring pilots to be licensed. There is no doubt of the validity of such acts, at least until congress has acted in the matter. As to pilot licenses, it is held that they must be signed by all the commissioners, or at least it must be shown that the license was granted at a full meeting of the board.[1] A pilot should have with him his warrant or license.[2] He must show it to the master in order to

[1] Wass v. The California, 13 Int. Rev. Dec. 166.

[2] Hammond v. Blake, 10 Barn. & C. 424; Commonwealth v. Ricketson, 5 Metc. 426.

make a valid tender of his services.[3] And between third parties it may be conclusive evidence of the pilot's authority.[4]

There are a number of cases supporting the decision in the principal case. A city ordinance exacting a license fee from the owner of tow-boats running on the Mississippi river to and from the Gulf of Mexico, was held not unconstitutional as a regulation of commerce.[5]

The case of Robbins v. Shelby County Taxing District[6] does not conflict with the decision in the principal case, because there the fee required from "drummers" was in the nature of a tax rather than a license. Nor is the case of Yick Wo v. Hopkins[7] opposed to the principal case, because the power to require a laundry license to be taken out was not denied; what was decided was, that such a license could not be arbitrarily refused because the applicant happened to be a Chinaman.

Whether a municipality can require a railway company to take out a license, depends upon the powers conferred upon the municipality by its charter. It has been held that authority granted by charter to the city of L to impose a license tax upon persons engaged in certain enumerated callings, and "upon any other person or employment which it may deem proper, whether such person or employment be herein specially enumerated or not," does not empower the city to levy such a tax upon a railway company doing business therein.[8]

In Wisconsin, under a State railway license law, it is held that, in ascertaining the basis of the license fee, the earnings for the whole year should be considered, and a computation made upon them, rather than upon the earnings of a fractional part of the year; and when one company commences operating a road early in any given year, and the same was operated by another company during the preceding year, the earnings of the latter company are the proper basis for computing the license fee to be paid by the company first mentioned. In computing the license fee according to the mileage of a road, the spur tracks should be included, and if the road be rented, the license fee should not be computed upon the balance accruing to the lessee road after paying rent, but upon gross earnings.[9]

There are quite a number of authorities sustaining the validity of a license fee of from $20 to $50 per car run by street car companies. One of the latest is Mayor v. Broadway, etc. R. Co.[10] By defendant's charter, its right to construct and operate a street railroad in the city of New York was made subject "to the payment to the city of the same license fee annually for each car run thereon as is now paid by other city railroads in said city." At the time the charter was granted two railroads in the city paid a license fee of $50 per car, one paid $20 per car, and three paid no license. In an action to recover license fees: *Held*, that the city was entitled to collect and receive and defendant must pay $50 per car, and also that interest was properly allowed.[11]

And a provision in an act of incorporation that the company shall pay such license for each car run "as is now paid by other passenger railway companies" does not import a contract that such license shall never be raised.[12]

ADELBERT HAMILTON.

[3] The Eldredge, Deady, 176.

[4] The Panama, Deady, 27.

[5] City of New Orleans v. Eclipse Tow-boat Co., 33 La. An. 647. And see also Am. Union Tel. Co. v. W. U. Tel. Co., 67 Ala. 26; Port of Mobile v. Leloup, 76 Ala. 401.

[6] 16 Am. & Eng. Corp. Cases.

[7] 118 U. S. 256.

[8] Lynchburg v. Norfolk W. R. Co., 9 Va. L. J. 377.

[9] State v. McFetridge, 24 N. W. Rep. 140.

[10] 97 N. Y. 275.

[11] See as to street car licenses, further, Allerton v. Chicago, 9 Biss. 552; Frankford, etc. R. Co. v. Philadelphia, 58 Pa. St. 119; State v. Hoboken, 41 N. J. L. 171.

[12] Union Pass. R. Co. v. Philadelphia, 101 U. S. 528. And see also Smith v. Alabama, 124 U. S. 465.

CORRESPONDENCE.

To the Editor of the Central Law Journal:

A leading article contained in No. 2 of the current (28th) volume of the JOURNAL on the "Statute of Limitations in Mortgage Foreclosures" appears somewhat misleading to the Illinois lawyer, particularly from the general language used, without exception referring to the Illinois statute, the questionable, if not erroneous, conclusion is reached that the familiar rule that a practical payment takes a case out of the statute, applies as well to the statute with regard to the foreclosure of mortgages as to that referring to written evidences of indebtedness, in Illinois. In the latter cases the statute (ch. 83, § 16) expressly provides that payments, etc., shall arrest the running of the statute; but in the 11th section no such exception is made, and by its terms action of foreclosure or sale is absolutely barred unless brought within ten years from the time the right of action on the mortgage accrues. Under these two sections of the Illinois limitation law it would seem that in the case of a note made January 1, 1877, payable one year after date, and secured by real estate mortgage, upon which note a payment had been made in 1880, that while suit might now be brought upon, and judgment obtained for the unpaid balance of the note, still the 11th section would be a complete bar to a foreclosure of the mortgage given to secure the payment of that debt.

JNO. B. FITHIAN.

Joliet, Ill., Jan. 11, 1889.

WEEKLY DIGEST

Of ALL the Current Opinions of all the State and Territorial Courts of Last Resort, and of the Supreme, Circuit and District Courts of the United States.

1. APPEAL— Order.——An order, refusing a motion to strike out an answer as shown, is not appealable.— *National A. E. Bank v. Cargill*, S. C. Minn., Nov. 30, 1888; 40 N. W. Rep. 570.

2. APPEAL— Filing Bond — Time. —— Rule 29 of the civil district court of the parish of Orleans must be so construed, that from the ten days for filing the appeal from the city court must be excluded the day on which the bond has been filed and the day on which the transcript is required to be filed in the appellate court. — *State v. Ellis*, S. C. La., Nov. 19, 1888; 5 South. Rep. 63.

3. APPEAL — Trial Order — Criminal Law. —— The judgment of a lower State court in a criminal case may, after denial of a writ of error to the supreme court, be considered final for the purpose of a writ of error to the Supreme Court of the United States.— *Clark v. Pennsylvania*, U. S. S. C., Nov. 19, 1888; 9 S. C. Rep. 113.

4. APPEAL — Injunction — Review. —— Upon appeal from an order granting an injunction, the action of the chancellor will not be reversed, unless it is clear that he has committed an error or abused a sound judicial discretion.— *McKinne v. Dickenson*, S. C. Fla., Oct. 9, 1888; 5 South. Rep. 34.

5. APPEAL—Insolvency Proceedings.——Under Oregon law, the review of final decisions of the circuit courts in insolvency proceedings is by appeal. — *Mitchell v. Powers*, S. C. Oreg., Oct. 16, 1888; 19 Pac. Rep. 647.

6. APPEAL—Jurisdiction—Tax-suits.——The supreme court has no jurisdiction over tax-suits, regardless of the amounts involved, unless the legality or constitutionality of the tax be in contestation. — *Johnson v. Cavanac*, S. C. La., Nov. 19, 1888; 5 South. Rep. 61.

7. APPEAL—Mandate—Counterclaim. —— Where the appellate court reverses the action of the trial court in dismissing the case, and orders the land sold to satisfy the notes sued on, the defendant can withdraw his counterclaim. — *Gallagher v. Whalen*, Ky. Ct. App., Nov. 24, 1888; 9 S. W. Rep. 701.

8. APPEAL—Review. —— Evidence held to justify the findings. — *Wyckoff v. Horan*, S. C. Minn., Nov. 22, 1888; 40 N. W. Rep. 563.

9. APPEAL— Review — Evidence. —— Where the evidence is conflicting, the refusal of the trial court to grant a new trial will not be disturbed. — *McGrath v. Village of Bloomer*, S. C. Wis., Dec. 4, 1888; 40 N. W. Rep. 585.

10. APPEAL—Time of Taking. —— A final decree was entered in the circuit court on Jan. 22, 1883, and on the same day an appeal was allowed but never prosecuted. On Jan. 22, 1885, a justice of the supreme court allowed an appeal, and the papers were presented to the circuit court Jan. 27, 1885: *Held*, that the appeal was not taken within the two years allowed.— *Credit Co. v. Arkansas C. R. R.*, Nov. 19, 1888; 9 S. W. Rep. 107.

11. ARMY AND NAVY — Longevity Acts. —— Congress intended to give an officer of the navy, under the acts of 1882 and 1883, credit in the grade held by him, after those acts took effect, for all prior services, whether as an enlisted man or officer, counting such services, however, separated by distinct periods of time, as if they had been continuous, and in the regular navy in the lowest grade having graduated, pay held by him since last entering the service.—*United States v. Foster*, U. S. S. C., Nov. 19, 1887; 9 S. C. Rep. 116.

12. ARMY AND NAVY — Naval Officers — Traveling Expenses.——Compensation to a naval officer for traveling expenses incurred in June and July, 1876, is regulated by the act of June 30, 1876, as to expenses incurred prior thereto. — *United States v. McDonald*, U. S. S. C., Nov. 26, 1888; 9 S. C. Rep. 117.

13. ARMY AND NAVY — Service — Midshipman. —— A cadet midshipman is an officer, and his time of service as such should be credited on a claim for additional pay under the act of March 3, 1883.— *United States v. Cook*, U. S. S. C.. Nov. 19, 1888; 9 S. C. Rep. 108.

14. ASSIGNMENTS FOR CREDITORS — Conflict of Laws. ——A general assignment for the benefit of creditors, executed in New York by a citizen of that State, in conformity with its laws, and intended to take effect whenever the assignor had property, passes title to debts due the assignor from citizens of Georgia, though schedules of debts and assets are not attached to the assignment, as required by the Georgia statutes.—*Birdseye v. Baker*, S. C. Ga., Nov. 5, 1888; 7 S. E. Rep. 863.

15. ASSIGNMENT FOR CREDITORS—Reservations.——A reservation in an assignment for the benefit of creditors of certain specified property, which the assignors claim as their exemptions, and by one of them of a homestead right, does not invalidate the assignment.— *Severson v. Porter*, S. C. Wis., Dec. 4, 1888; 40 N. W. Rep. 577.

16. ATTORNEY—Client's Land— Purchase. —— An attorney who is employed to prepare a conveyance and is consulted as to the purpose of it, and who afterwards purchases the land at a sale under execution against the grantor, cannot attack the conveyance as fraudulent.—*Davis v. Kline*, S. C. Mo., Nov. 26, 1888; 9 S. W. Rep. 724.

17. ATTORNEY—Disbarment. —— It is sufficient cause for disbarment for an attorney to urge and aid in a prosecution, and then appear for the defense of a person charged with crime, or to encourage the commencement of proceedings which he knows or has reason to know are illegal or unjust. — *In re Stephens*, S. C. Cal., Nov. 21, 1888; 19 Pac. Rep. 646.

18. ADMIRALTY—Practice— General Appearance. —— A libel for breach of a charter party was brought against A as sole owner. A not being within the jurisdiction of the court the ship was attached, when his proctors put in a general appearance for him, filed security and had the ship released. A plea in abatement for defect of parties being sustained, libelant was allowed to amend: *Held*, that it was not necessary to serve A in person with a copy of the order. — *Card v. Hines*, U. S. D. C. (S. Car.), Nov. 10, 1888; 36 Fed. Rep. 573.

19. BAIL—Bond—Conditions. ——A bail bond obligating the principal to appear at the next term of the district court, designating a day at which a legal term can be held, is void. If the day was the proper day accordintg to the law then in force, it is valid, though the time for holding court is changed by statute before the specified day. — *Douglas v. State*, Tex. Ct. App., Oct. 10, 1888; 9 S. W. Rep. 783.

20. BILLS AND NOTES—Consideration— Notice. —— A purchaser of land, who is informed by the vendor of the true state of the title, and takes a deed with warranty, cannot escape liability on notes given for the price, on the ground of failure of consideration.—*Fagan v. McWhirter*, S. C. Tex., Oct. 26, 1888; 9 S. W. Rep. 677.

21. BONDS—Default—Presentment.—— Where coupon bonds contain a condition that, if payment after maturity and demand continues for ninety days, the principal shall be due, presentment and demand on January 2, though premature as to the interest due January 1, is due presentment as to that maturing the July 1 previous.—*Wood v. Consolidated E. L. Co.*, U. S. C. C. (N. Y.), Nov. 8, 1888; 36 Fed. Rep. 538.

22. CARRIERS—Contracts — Limiting Liability.—— A contract of carriage by rail of goods from Boston to Atlanta, made in Massachusetts, limiting the carrier's liability, if valid in Massachusetts is valid in Georgia, though it would not be valid if made in Georgia.—*Western & A. R. R. v. Exposition C. M.*, S. C. Ga., Nov. 5, 1888; 7 S. E. Rep. 916.

23. CARRIERS—Delay in Delivery — Market Price.—— A cargo of prunes, which should have been delivered not later than April 28, was delivered by the carrier's delay June 11, and damaged. They were sold July 8, when good prunes were worth six cents per pound, but the damaged prunes brought only five and one-half cents per pound. On April 28, good prunes were worth five cents per pound: *Held*, that libelant was entitled to recover the difference between the market price on the day of delivery and the price for which the prunes sold. —*Morrison v. I. & V. Florio S. S. Co.*, U. S. D. C. (N. Y.), Nov. 5, 1888; 36 Fed. Rep. 569.

24. CHINESE — Exclusion Acts. —— The Chinese restriction acts of 1882 and 1884, and the exclusion act of 1888, are not applicable to citizens of the United States, though of Chinese parentage. — *In re Wy Shing*, U. S. C. C. (Cal.), Nov. 8, 1888; 36 Fed. Rep. 553.

25. COLLISION—Steamer and Tug—Rule Starboard.—— The steamer T was coming into the North river from sea. The tug T was going down river with a tow and was on the starboard hand of the S; the latter tried to cross the tug's path to make her slip and was struck by the tug: *Held*, that the steamer was in fault. — *Ocean S. S. Co. v. The Talisman*, U. S. D. C. (N. Y.), Oct. 20, 1888; 36 Fed. Rep. 600.

26. COLLISION—Tide Currents.——A steamer is bound to keep out of the way, must at her own peril shape her course for a safe margin against the contingencies of navigation and the effects of tide-currents. — *The Sammie*, U. S. C. C. (N. Y.), Oct. 15, 1888; 36 Fed. Rep. 568.

27. COLLISION—Inevitable Accident. —— It is not inevitable accident for an up steamer in the North river to strike a barge, the stern of which projected beyond the end of a pier some ten or twelve feet, even if it could be avoided if the wind and tide were otherwise than they were, as pilots are expected to know and provide for such contingencies. — *Moore v. The Mary Powell*, U. S. C. C., (N. Y.), Oct. 13, 1888; 36 Fed. Rep. 598.

28. CONTRACT—Construction.——A guaranty that the stock of a corporation, whose assets consist of real estate, shall pay dividends at the rate of four per cent. beyond all contingency and net, does not bind the guarantor to pay the salaries of its officers nor the expense of improving its property, but binds him to pay the commission of rental agents. — *Centrall B. B. Ass. v. James*, S. C. Ga., Oct. 22, 1888; 7 S. E. Rep. 862.

29. CONTRACT — Performance. ——Facts stated upon which the court holds not a sufficient and substantial performance of a contract for boring a gas well. — *Gilispie Tool Company v. Wilson*, S. C. Penn., Nov. 5, 1888; 16 Atl. Rep. 36.

30. CONTRACTS—Sale—Realty.——A writing acknowledging the receipt of a specified sum as a part of the purchase price of a tract of land, the title to which is to be executed at a future time, and the terms of which are to be ascertained by a reference to another writing, does not transfer the ownership of the property, but is only a promise of sale. — *Thompson v. Duson*, S. C. La., July Term, 1888; 5 South. Rep. 58.

31. COSTS—Criminal Case—Dismissal. —— Where the costs in a prosecution before a justice, dismissed as frivolous, have been taxed against the prosecutor, they cannot afterwards upon return of *nulla bona* be taxed to the State.—*Morgan v. Pickard*, S. C. Tenn., Dec. 15, 1887; 9 S. W. Rep. 690.

32. COSTS— Taxation. —— Where costs in an attachment case were allowed in the sum of $190 to the sheriff for care, preservation and custody of attached property, it was not error to sustain the motion to retax his fees, and he should be required to itemize them. — *Reed v. Smith*, S. C. Neb., Nov. 28, 1888; 40 N. W. Rep. 591.

33. COUNTIES—Treasurer—Fees. —— A county treasurer is not allowed to retain out of the fees and money collected by him anything in excess of the annual salary allowed by law. — *Gerken v. County Commrs.*, S. C. Minn., Nov. 22, 1888; 40 N. W. Rep. 508.

34. COURTS— Supreme — Certificate of Division. —— The question, whether the court should have instructed the jury to find for the defendant, is not a proper one to be certified to the supreme court. — *Fire I. Ass. v. Wickham*, U. S. S. C. Nov. 26, 1888; 9 S. C. Rep. 113.

35. CRIMINAL LAW—Appeal — Errors. —— Where the two defenses of *alibi* and self-defense are interposed to an indictment for assault to murder, the omission to charge specially on the defense of *alibi* is not reviewable, in the absence of a request so to charge and exception to the refusal. — *Rider v. State*, Tex. Ct. App., Oct. 31, 1888; 9 S. W. Rep. 688.

36. CRIMINAL LAW—Assault—Threats.——On trial for assault with intent to murder, evidence of a previous assault and threats by defendant against the injured person is admissible to show the intent with which the last assault was made.—*Lawrence v. State*, S. C. Ala., July 12, 1888; 5 South. Rep. 33.

37. CRIMINAL LAW—Assault and Battery—Jurisdiction. ——Where it appears from the evidence in the trial of an assault and battery case before the supreme court, that no deadly weapon was used, no serious damage done, and the offense was committed within six months before the action was begun, the prosecution must be dismissed.— *State v. Porter*, S. C. N. Car., Nov. 26, 1888; 7 S. E. Rep. 902.

38. CRIMINAL LAW—Assault and Battery— Threats.—— On a trial for assault and battery, threats made a few hours before the alleged assault to commit it may be proved.—*State v. Henn*, S. C. Minn., Nov. 30, 1888; 40 N. W. Rep. 572.

39. CRIMINAL LAW—Burglary— Indictment.——An indictment for burglary of a railroad car charged that defendant did break and enter a railroad car, occupied and controlled by B, with intent then and there fraudulently to take from said car property therein, being and belonging to said B, without his consent and with intent to deprive, etc.: *Held*, not defective.— *Hamilton v. State*, Tex. Ct. App., Oct. 24, 1888; 9 S. W. Rep. 687.

40. CRIMINAL LAW— Embezzlement—Indictment.—— An indictment, alleging that defendant while in service converted money of her master, contrary to the confidence reposed in her, is good under Code North Carolina, § 1014. — *State v. Wilson*, S. C. N. Car., Nov. 19, 1888; 7 S. E. Rep. 872.

41. CRIMINAL LAW—Exclusion of Witnesses.——Where, on the trial of a criminal case, the witnesses are separated and excluded during the hearing except the one testifying, it is not error to refuse to exclude two of the witnesses who are attorneys of the court.—*Allen v. Com.*, Ky. Ct. App., Nov. 22, 1888; 9 S. W. Rep. 703.

42. CRIMINAL LAW—False Pretenses.——A false statement by one, that he is sent by another to the person addressed after five dollars in money, is a false pretense, under Code North Carolina § 1025.—*State v. Dixon*, S. C. N. Car., Nov. 19, 1888; 7 S. E. Rep. 870.

43. CRIMINAL LAW—Forgery— Writing. —— It is sufficient in a prosecution for forgery that the instrument be one by the use of which money or goods can be obtained. It need not purport on its face to be an order for the payment of money or delivery of goods. — *State v. Wingard*, S. C. La., Oct. 8, 1888; 5 South. Rep. 54.

44. CRIMINAL LAW—Gaming—Evidence. ——Evidence that defendant had the doors of his sleeping apartment blanketed, invited his friends there at night to drink, and kept in his room besides barrels and bottles a table suitable for gaming, besides cards and boxes of chips, and that some of the guests hid themselves when surprised by the police at a time, when the rattle of chips and money was heard, sustains a conviction for keeping a gaming-house. — *Pacetti v. State*, S. C. Ga., Nov. 5, 1888; 7 S. E. Rep. 867.

45. CRIMINAL LAW— Homicide — Indictment. —— An

indictment, which avers that defendant and his co-defendant struck and killed deceased with an axe is sufficient, though the proof shows that defendant held a light while his co-defendant struck the blow. — *Ross v. Com.*, Ky. Ct. App., Nov. 15, 1888; 9 S. W. Rep. 707.

46. CRIMINAL LAW—Indictment— Duplicity.——If an indictment attempts to charge two offenses, bnt one of them insufficiently, it is not therefore double; to be so it must set out each sufficiently. — *State v. Henn*, S. C. Minn., Nov. 28, 1888; 40 N. W. Rep. 564.

47. CRIMINAL LAW—Infamous Offense—Indictment.—— The president of a national bank can only be held on presentment or indictment by the grand jury for embezzlement or making false entries in violation of Rev. St. United States, § 5209.—*United States v. DeWalt*, U. S. S. C., Nov. 19, 1888; 9 S. C. Rep. 111.

48. CRIMINAL LAW—Jurisdiction— Foreign Arrest.—— The courts of Texas have jurisdiction to try one accused of a crime committed in that State, though he was arrested by a Texas sheriff outside the State, and brought into it without lawful authority, and against his will, for the purpose of being tried.—*Brooken v. State*, Tex. Ct. App., Oct. 13, 1888; 9 S. W. Rep. 735.

49. CRIMINAL LAW — Larceny — Circumstantial Evidence.——The circumstantial evidence was held to be sufficient to sustain a conviction of larceny. — *State v. Goings*, S. C. N. Car., Nov. 26, 1888; 7 S. E. Rep. 900.

50. CRIMINAL LAW—Larceny— Fraudulent Intent.—— Defendant took away rails, which he had cut on another's land: *Held*, that the evidence introduced did not show a fraudulent intent.— *DeMint v. State*, Tex. Ct. App., Nov. 3, 1888; 9 S. W. Rep. 738.

51. CRIMINAL LAW—Misconduct of Jury. —— It is not misconduct on the part of a jury to procure and read law books after they have decided upon their verdict, although it has not been formally rendered in open court. — *State v. Wilson*, S. C. La., Oct. 6, 1888; 5 South. Rep. 52.

52. CRIMINAL LAW—Murder — Self-defense. —— In a murder trial the defendant may justify on the ground of self-defense, though he himself brought on the quarrel, provided that in so doing he was not actuated by a design to kill deceased or to do him great bodily harm.— *State v. Parker*, S. C. Mo., Nov. 26, 1888; 9 S. W. Rep. 728.

53. CRIMINAL LAW—Statutes—Repeal. —— The repeal of a federal statute does not under the revised statutes release or extinguish any penalty or liability, unless the repealing act shall so expressly provide.— *United States v. Reisinger*, U. S. S. C., Nov. 26, 1888; 9 S. C. Rep. 99.

54. CRIMINAL LAW—Trespass.——One who goes upon land solely at the invitation of the tenant and not willfully and maliciously, is not indictable, under North Carolina law, for trespassing on land, although the landowner had previously forbidden him to go there.—*State v. Lawson*, S. C. N. Car., Nov. 26, 1888; 7 S. E. Rep. 905.

55. CUSTOMS—Carriers of Goods— Liability. —— Evidence of customs of a carrier of goods, limiting its liability or care, were rejected in this case, as being unreasonable, or a limitation of its common law liabilities, or that they were not shown to be uniform, reasonable and notorious. — *Missouri P. R. R. v. Fagan*, S. C. Tex., Nov. 27, 1888; 9 S. W. Rep. 749.

56. DAMAGES—Hiring — Discharge. —— In an action for breach of contract of employment brought before the contract term had expired, in extending the damages all the facts down to the time of trial may be considered. The discharged servant must use due diligence in seeking other employment, and his income so derived must be deducted from the damages. — *Roberts v. Crowley*, S. C. Ga., Oct. 5, 1888; 7 S. E. Rep. 740.

57. DECEIT— Fraud — Silence. —— If the seller of a herd of cattle purposely kept silent when he ought to have spoken, or by any language or acts intentionally misled the purchaser about the number of cattle in the herd or the number of calves branded, or by any acts or by silence consciously misled or deceived him, or permitted him to be misled or deceived, the seller made material misrepresentations. — *Stewart v. Wyoming C. R. Co.*, U. S. S. C., Nov. 19, 1888; 9 S. C. Rep. 101.

58. DEED—Acknowledgment — Record. —— Though the language of the certificate of recordation of a deed, under Virginia law, is doubtful, yet when it recites due acknowledgment and shows an order for recordation, the order must be presumed to have been properly made, until the contrary is shown.—*Peyton v. Carr*, S. C. App. Va., Nov. 8, 1888; 7 S. E. Rep. 848.

59. DEDICATION — Alleys. —— Where the alleys of a city have been dedicated to the public, no further action is required by the city to open them for public use. — *Osage City v. Larkins*, S. C. Kan., Nov. 10, 1888; 19 Pac. Rep. 658.

60. DOWER—Mortgage — Wife. —— While the act of 1875, abolishing dower was in force, it was not necessary for a married woman to join in her husband's mortgage of lands other than the homestead.—*Roach v Dion*, S. C. Minn., Nov. 22, 1888; 40 N. W. Rep. 512.

61. EJECTMENT — Evidence — Destroyed Deed.—— Plaintiff in ejectment may give evidence of a deed destroyed before registration, without first having the same established in an independent action and recorded.—*Jennings v. Reevis*, S. C. N. Car., Nov. 26, 1888; 7 S. E. Rep. 897.

62. EJECTMENT—Title—Evidence. —— When defendant in ejectment claims under a title bond, but has not claimed the legal title till shortly before suit, findings in favor of plaintiff, who holds under a deed conveying the legal title, executed more than thirty years before the suit, the evidence being conflicting, cannot be disturbed.—*Cox v. Reid*, Ky. Ct. App., Nov. 17, 1888; 9 S. W. Rep. 693.

63. ELECTIONS—Domicile.——A single man, lodging in one precinct in Detroit and boarding in another, shall register and vote in the latter.—*Warren v. Bd. of Registration*, S. C. Mich., Nov. 1, 1888; 40 N. W. Rep. 553.

64. ELECTIONS AND VOTERS — Contests — Recount of Ballots.—— Section 100 of "an act to regulate elections" (P. L. 1876, p. 163), confers upon the several circuit courts of this State jurisdiction in cases of contested elections for city officers. An application for a recount of ballots, not offered as part of a party's proofs, must conform to the statutory requirements governing such applications. — *McCoy v. Boyle*, S. C. N. J., Nov. 12, 1888; 16 Atl. Rep. 15.

65. EMINENT DOMAIN—Arbitration and Award—Ejectment.——*Held*, that plaintiff could maintain ejectment for land belonging to him, appropriated and used by a railroad company, where the question of compensation was submitted to arbitration, and the award was made but the amount was never made.—*Wheeling, etc. Co. v. Warrell*, S. C. Penn., Oct. 29, 1888; 16 Atl. Rep. 20.

66. EQUITABLE CONVERSION—Will.——A will directing a sale of land at a time named, but permitting the widow "to detain the sale and possess the land as she sees cause," should she deem a sale prejudicial to her interest and directs a sale of all surplus property remaining at her death, works an equitable conversion.—*Mellon v. Reed*, S. C. Penn., Oct. 23, 1888; 15 Atl. Rep. 906.

67. EQUITY—Decree—Revival.——A clause in a decree providing that any of the parties to this suit have leave to ask any such further order as may be necessary to enforce the same, does not authorize the revival of the suit twenty-eight years after.—*Riely v. Kinzel*, S. C. App. Va., Nov. 15, 1888; 7 S. E. Rep. 907.

68. EQUITY —Reforming Deed — Laches. —— Plaintiff, who brought suit to reform a deed granting a right of way, which by mistake described the wrong land, was not guilty of laches, the suit being brought within six years from the time his right to use the way was first denied, though nineteen years had elapsed since the deed was made.—*Grosbach v. Brown*, S. C. Wis., Nov. 8, 1888; 40 N. W. Rep. 494.

69. EQUITY—Trust—Merger.—— Where land held under a parol trust to convey on payment of a sum of money is sold under execution against the trustee, and the purchaser conveys to the *cestui que trust*, the equity

merges in the legal title, and one who acquires the land by mortgage from the *cestui que trust* and sale thereunder cannot sue the trustee's grantee, with notice of the trust, to enforce it.—*Peacock v. Stott*, S. C. N. Car., Oct. 29, 1888; 7 S. E. Rep. 885.

70. EVIDENCE—Best and Secondary. — The certified copy of a bill of sale is admissible when it is shown that the holder of the original is in Mexico.—*Veck v. Holt*, S. C. Tex., Nov. 13, 1888; 9 S. W. Rep. 743.

71. EVIDENCE—Conversations.——Though part of a conversation has been proved, the adverse party is not entitled to introduce the rest, unless in itself relevant or explanatory of the part already in evidence.—*McAuley v. Harris*, S. C. Tex., Oct. 30, 1888; 9 S. W. Rep. 679.

72. EVIDENCE—Will—Record.——An exemplification of the record of a will, duly proved, is admissible in evidence in another county in which lands devised by it are situated, but in the recorder's office of which it is not recorded, though Rev. Stat. Mo. 1879, § 3991, require it to be recorded there.—*Rodney v. McLaughlin*, S. C. Mo., Nov. 26, 1888; 9 S. W. Rep. 726.

73. EVIDENCE—Writings—Proof.—— Under Alabama law, the written contract between the parties sued on is admissible in evidence, without proof of execution, in the absence of a verified plea denying it.—*Pollack v. Brush E. Assn.*, U. S. S. C., Nov. 19, 1888; 9 S. C. Rep. 119.

74. EVIDENCE—Written Contract—Parol.——Where a written contract is made and delivered, and nothing remains to complete its execution, parol evidence is inadmissible to prove an understanding that it shall not be operative according to its terms.—*McCormick H. M. Co. v. Wilson*, S. C. Minn., Nov. 30, 1888; 40 N. W. Rep. 571.

75. EXECUTION—Notice—Debtor. —— Failure of the sheriff to give the statutory notice of the levy to the execution debtor does not make the execution sale void.—*Cowles v. Hardin*, S. C. N. Car., Nov. 26, 1888; 7 S. E. Rep. 896.

76. EXECUTION—Sale—Appraised Value.—— When a sheriff levies on real estate under an execution, he must have the real estate itself, and not a mere interest therein appraised, and if he sells it for less than two-thirds of its appraised value the sale is void, but the execution debtor may treat it as valid, and sue the sheriff for damages.—*DeJarnette v. Verner*, S. C. Kan., Nov. 10, 1888; 19 Pac. Rep. 666.

77. EXECUTORS—Expenses. —— Expenses of an administrator disallowed, where the record only showed that he bid off the land in his own name under a judgment wherein the estate was not interested, and prosecuted the suit to establish the title in his own name for the benefit of the estate.—*Reeves v. McMillan*, S. C. N. Car., Nov. 26, 1888; 7 S. E. Rep. 906.

78. EXECUTORS—Limitations.——Under North Carolina law, an action against an administrator *de bonis non* may be brought within a year after his qualification, if the cause of action was not barred when the executor was removed.—*Smith v. Brown*, S. C. N. Car., Nov. 19, 1888; 7 S. E. Rep. 890.

79. EXECUTORS—Limitations—Heir.——A suit brought after seven years subsequent to the death of the debtor to subject lands in the possession of the heir to a judgment recovered within the seven years against the administrator, is not barred by Rev. Code N. C., ch. 65, § 11.—*Lee v. Beaman*, S. C. N. Car., Nov. 12, 1888; 7 S. E. Rep. 887.

80. EXECUTORS—Official Sale — Impeachment. —— A party, who has been administrator of an estate, obtained the order of sale under which the property was sold to pay debts, and inaugurated and consummated the proceedings complained of, in an action of nullity cannot be permitted to impeach them by his own testimony.—*Linman v. Riggins*, S. C. La., Oct. 6, 1888; 5 South. Rep. 49.

81. EXECUTORS—Pleading.——One suing an administrator need not prove his aministratorship, unless it is denied in defendant's pleadings.—*Parker v. Bray*, S. C. Ga., Nov. 21, 1888; 7 S. E. Rep. 922.

82. EXECUTORS—Powers—Sale of Realty. —— A sale of land, as directed by the testator, by an administrator with the will annexed, passes a good title, under North Carolina law, though the persons entitled to the proceeds of the sale have previously conveyed their interests in the land.—*Orrender v. Call*, S. C. N. Car., Nov. 26, 1888; 7 S. E. Rep. 878.

83. EXEMPTIONS — Appraisers—Constable.——A constable levying an execution from a constable's court must, on demand of defendant, summon appraisers to allot defendant his personal property exemptions, and can administer the required oath.—*McAulay v. Morris*, S. C. N. Car., Nov. 19, 1888; 7 S. E. Rep. 883.

84. EXTRADITION—International—Evidence. —— Under the treaty of 1852, for extradition made with Germany, it is sufficient that a *prima facie* case be made, such as in the absence of explanation would justify conviction, or such evidence as in case of trial and conviction thereon would sustain the verdict. —*In re Risch*, U. S. D. C. (Tex.), 1888; 36 Fed. Rep. 546.

85. FRAUD—Inadequacy of Price—Consideration.—— Land worth not over $200 was sold for $600 to an ignorant woman, who was unacquainted with its value, by one who had been the friend and physician of her deceased husband, and to whom she was very grateful for kindness: *Held*, that the sale should be rescinded.—*Hunter v. Owen*, Ky. Ct. App., Nov. 20, 1888; 9 S. W. Rep. 717.

86. FRAUDULENT CONVEYANCES—Injunction—Note.—— In Maryland, the holder of a promissory note, which has not been reduced to judgment, cannot enjoin the maker from conveying his property, on the ground that the purpose of the conveyance is to hinder him in the collection of his debt.—*Balls v. Balls*, Md. Ct. App., Nov. 22, 1888; 16 Atl. Rep. 18.

87. FRAUDULENT CONVEYANCE — Setting Aside — Administrator. —— Under Texas law, an administrator cannot sue to set aside a conveyance made by his intestate, with intent to defraud creditors, though the estate is insolvent.—*Wilson v. Demander*, S. C. Tex., Oct. 30, 1888; 9 S. W. Rep. 678.

88. GAMING—Presumption — Constitutional Law.—— The fourth section of the act of 1887, that if any of the implements or devices, commonly used in games of chance usually played in gambling houses, are found in any house, it shall be *prima facie* evidence that said house is kept for the purpose of gambling, is constitutional.—*Wooten v. State*, S. C. Fla., Oct. 8, 1888; 5 South. Rep. 39.

89. GARNISHMENT—Municipal Corporation.——A municipal corporation, invested with power to establish and maintain public schools, is not subject to garnishment, in respect to a debt which it owes for work done on a municipal school house.—*Born v. Williams*, S. C. Ga., Nov. 9, 1888; 7 S. E. Rep. 868.

90. HOMESTEAD—Abandonment.——A moved from his homestead with his family to his wife's land in another State, intending to place the latter in a condition to rent, and to return home in about two years. He returned two or three times a year to purchase supplies and look after his property: *Held*, an abandonment of the homestead.—*Lee v. Moseley*, S. C. N. Car., Nov. 19, 1888; 7 S. E. Rep. 874.

91. HUSBAND AND WIFE—Her Land — Lease. ——A wife cannot lease without her husband's consent lands held by her otherwise than as a separate estate. — *Ables v. Ables*, S. C. Tenn., Feb. 2, 1888; 9 S. W. Rep. 692.

92. HUSBAND AND WIFE—Mortgage—Foreclosure.—— When the property of the husband is sold on mortgage, the wife may purchase it and hold it free from any liability on account of her husband's debts, provided she does so in good faith and with her own money. — *Houston v. Nord*, S. C. Minn., Dec. 10, 1888; 40 N. W. Rep. 568.

93. HUSBAND AND WIFE—Personal Injuries—Suit.—— When a married woman is living separate from her husband by reason of his desertion, an action for personal injuries to her is properly brought by her alone,

under California law. — *Baldwin v. Second S. S. Co.*, S. C. Cal., Nov. 22, 1888; 19 Pac. Rep. 644.

94. HUSBAND AND WIFE—Separate Estate — Covenants —Heirs.——A, a married woman, having a separate estate, made a voluntary partition thereof with C, and agreed to warrant and defend the title to the lots set apart to C. Her husband did not join in the deed of partition. The covenant having been broken after the death of B: *Held*, on a bill filed by C against her heirs to recover damages after her death, that the covenant became a charge on the separate estate of B, owned at the time the covenant was made. — *Barlaw v. Delany*, U. S. C. C. (Mo.), Nov. 8, 1888; 36 Fed. Rep. 577.

95. HUSBAND AND WIFE—Wife — Mortgage. —— The South Carolina married woman act of 1870, though not retroactive, gave married women power to mortgage land acquired before its passage. — *Gleaton v. Gibson*, S. C. S. Car., Nov. 5, 1888; 7 S. E. Rep. 833.

96. INJUNCTION—Conflicting Jurisdiction. —— Where the State court enters a decree before an order in the federal court to show cause why an injunction should not issue is heard, making the acts sought to be enjoined a contempt of the State court if done, and rending the federal process merely ancillary, the injunction will be denied.— *Garrett v. New York T. & T. Co.*, U. S. C. C. (N. Y.), Oct. 17, 1888; 36 Fed. Rep. 513.

97. INSURANCE—Acts of Agent—Liability.——Insurance was affected by a person unable to read or write, who was guilty of no fraud or misrepresentations, but trusted to the agent. The latter knew that the applicant had but a part interest in the property but stated that she owned it: *Held*, that her interest was covered by the policy, though the policy stated that the interest must be in fee simple or stated truly in the policy. — *Hartford F. I. Co. v. Haas*, Ky. Ct. App., Nov. 20, 1888; 9 S. W. Rep. 720.

98. INSURANCE—Mutual Benefit — Action. —— Where by the constitution of a mutual benefit society the contract of insurance was complete upon the approval by the supreme lodge and the forwarding of the certificate to the subordinate lodge, a recovery may be had after such forwarding without the production thereof, when the lodge has retained it.—*Lorcher v. Supreme L. K. of H.*, S. C. Mich., Nov. 1, 1888; 40 N. W. Rep. 545.

99. INSURANCE—Proof of Loss—Waiver. ——Facts upon which court held there was evidence fairly tending to show a waiver of complete proof of loss in an action on insurance policy. — *Snowden v. Kittamning Co.*, S. C. Penn., Oct. 29, 1888; 16 Atl. Rep. 22.

100. INTEREST—Damages. —— A jury cannot add interest to discretionary damages awarded by them for a personal injury. Only special damages, computable upon direct or indirect evidence of actual damages, can be thus increased. — *Western & A. R. R. v. Young*, S. C. Ga., Nov. 9, 1888; 7 S. E. Rep. 912.

101. INTEREST—Rate—Foreign State.—— A note executed in California will not bear any higher rate of interest than a Kentucky note, when sued on in Kentucky, unless the California law allowing a higher rate has been properly pleaded as well as proved.— *Templeon v. Sharp*, Ky. Ct. App., Nov. 26, 1888; 9 S. W. Rep. 696.

102. INTARSTATE COMMERCE—Regulations.——Transportation between two points in the same State over connecting railroad lines, one of which lies wholly in another State, is interstate commerce, and a State railroad commissioner cannot regulate it. — *Stemberger v. Cape Fear, etc. R. R.*, S. C. S. Car., Oct. 30, 1888; 7 S. E Rep. 836.

103. INTOXICATING LIQUORS— Former Conviction.—— A conviction for selling liquor to a minor without the consent of his parent is no bar to a prosecution for the same act under the law against selling liquor without license.—*Blair v. State*, S. C. Ga., Oct. 17, 1888; 7 S. E. Rep. 855.

104. INTOXICATING LIQUORS—Illegal Sale—Jurisdiction. ——The superior court has jurisdiction of offenses for illegal sales of liquor under Code N. C. § 1076, the penalty being in the discretion of the court.—*State v. Deaton*, S. C. N. Car., Nov. 19, 1888; 7 S. E. Rep. 855.

105. INTOXICATING LIQUORS — License —Local Option. ——An indictment will lie for selling spirituous liquors by small measure without a license, even in places where local option has been adopted.—*State v. Smiley*, S. C. N. Car., Nov. 26, 1888; 7 S. E. Rep. 904.

106. INTOXICATING LIQUORS— License—Revocation.—— The Georgia act of 1887, which forbids the sale of intoxicating liquors, without excepting persons holding unexpired licenses, operates as a revocation of such licenses. — *Brown v. State*, S. C. Ga., Nov. 12, 1888; 7 S. E. Rep. 915.

107. INTOXICATING LIQUORS—Local Option.——Under the act of 1886, the general local option law of January of 1874 went into effect in district No. 3 in Garrard county as soon as the election therein provided for was held and resulted in a majority vote therefor. — *Com. v. Lillard*, Ky. Ct. App., Nov. 15, 1888; 9 S. W. Rep. 710.

108. INTOXICATING LIQUORS—Sale— Local Option.—— Upon trial for violation of the Kentucky local option law for Hardin county, it is not necessary to prove that a majority of the qualified voters of the county had voted in favor of adopting the law. — *Neighbors v. Com.*, Ky. Ct. App., Nov. 26, 1888; 9 S. W. Rep. 718.

109. INTOXICATING LIQUORS—Sales to Minors.——It is no defense to a prosecution for selling intoxicating liquors to a minor without the written consent of his parent or guardian, that his parents were dead and he had no guardian.—*Blair v. State*, S. C. Ga., Oct. 12, 1888; 7 S. E. Rep. 855.

110. INVENTIONS—Drainage System—Infringement.—— Letters patent No. 253,754, to C. W. Durham, for a drainage system which supports itself independently of the building is not infringed by the defendant's system which is rested on the ground and did not contain the supports of the complainant's system. — *Durham H. S. Co. v. Armstrong*, U. S. C. C. (N. Y.), Nov. 19, 1888; 36 Fed. Rep. 596.

111. INVENTIONS—Lawn Sprinklers. ——The first claim in patent 183,188, to J. W. McGaffey for fountain hose-carriages is void. The second claim must be limited to such a clasp as is there shown. The fourth claim is not infringed by a similar machine, whose locking devise is a pawl and rachet, and not a set-screw. — *Preston v. Manard*. U. S. C. C. (Ill.), Jan. 6, 1882; 36 Fed. Rep. 557.

112. INVENTIONS—Letter Files — Invalidity.——Claim 1, of letters patent No. 254,847, issued March 14, 1882, to J. S. Shannon for paper file, is void for want of patentability.—*Schlict v. Sherwood L. F. Co.*, U. S. C. C. (Ill.), Nov. 5, 1888; 36 Fed. Rep. 587.

113. INVENTIONS—Letter Files— Invalidity — Anticipation.——Claim 1, of letters No. 217,907, to J. S. Shannon for improvement in "temporary binders" is void, being anticipated by the Bussey patent of January 8, 1878. — *Schlict v. Sherwood L. F. Co.*, U. S. C. C. (Ill.), Nov. 5, 1888; 36 Fed. Rep. 590.

114. INVENTIONS—Letter Files— Novelty. —— Letters patent No. 217,909, issued July 29, 1879, to F. W. Smith and J. S. Shannon for improvement in paper holders, cover a novel and patentable service, and are valid.—*Schlict v. Chicago L. M. Co.*, U. S. C. C. (Ill.), Nov. 5, 1888; 36 Fed. Rep. 585.

115. INVENTIONS—Novelty— Demurrer. ——A demurrer to a bill to enjoin the infringement of patent 17,270 to Leon H. Prentice for ornamenting radiator pipes, for want of novelty in the invention will not be sustained, unless the court from its own knowledge has no doubt that the devise is well known and in common use. — *Eclipse M. Co. v. Adkins*, U. S. C. C. (Ill.), Oct. 15, 1888; 36 Fed. Rep. 554.

116. INVENTIONS—Prior Adjudication—Injunction— Infringement. —— A restraining order pending suit for infringement of a patent will be granted where the patent has previously been held valid by other courts. — *Schneider v. Mo. Glass Co.*, U. S. C. C. (Mo.), Oct. 31, 1888; 36 Fed. Rep. 582.

117. INVENTIONS—Specifications—Certainty.——Specifications which to the uninitated might appear to be

vague and indefinite are sufficient, if they appear clear to those skilled in the art to which the invention appertains. — *Am. Ende v. Seabury*, U. S. C. C. (N. Y.), Nov. 15, 1888; 36 Fed. Rep. 593.

118. INVENTIONS—Stone Settings—Novelty. —— Patent No. 319,096 to S. Joel June 2, 1885, for improvement in holders for the setting of stones, the object of which was to provide a convenient tool for holding the stone while it was being manipulated by the workman, is void for want of novelty.— *Joel v. Gesswein*, U. S. C. C. (N. Y.), Nov. 10, 1888; 36 Fed. Rep. 592.

119. JUDGMENT—Res Adjudicata—Privies.——An action between adverse claimants to a trade-mark is concluded by a judgment in favor of defendant's assignee in a subsequent action by him against the plaintiff in the first action, the question of fact in each case being the same.—*McElvee v. Blackwell*, S. C. N. Car., Nov. 19, 1888; 7 S. E. Rep. 893.

120. JUDICIAL NOTICE—Presumptions. —— This court is bound to take judicial cognizance of the principles of the common law as it prevails in other States, but will presume the statutes of other States to agree with our own in the absence of proof to the contrary.— *Sandidge v. Hunt*, S. C. La., Oct. 23, 1888; 5 South Rep. 55.

121. JUDICIAL SALES—Payment—Receiver.——A purchaser at judicial sale, who pays the price to a receiver before the latter has given bond as ordered by the court, may be made to pay again on the receiver's failure to account for the money, though the latter afterwards gave bond.—*Woods v. Ellis*, S. C. App. Va., Nov. 15, 1888; 7 S. E. Rep. 852.

122. JUDICIAL SALES—Purchaser—Suit.——Land conveyed to a trustee, as surety, was sold in an action on the debt, and the report of the sale confirmed, but the trustee executed a conveyance to a third party and the suit terminated: *Held*, that a motion would not lie by the purchaser at the sale, who was not a party to the suit, to reinstate it and to compel the trustee to convey to him.— *Mock v. Coggin*, S. C. N. Car., Nov. 26, 1888; 7 S. E. Rep. 899.

123. JOINT STOCK COMPANY — Statute. —— Construction of the act Pa. 1874, authorizing the formation of joint stock-companies. — *Lauder v. Logan*, S. C. Penn., Nov. 5, 1888; 16 Atl. Rep. 44.

124. JURISDICTION—Amount—Remittitur.—Plaintiff in open court in the absence of the defendant was allowed to remit $500 of a judgment for $5,500. A motion to set aside the remittitur was denied: *Held*, that a motion to dismiss the writ of error will be granted. — *Pacific P. T. C. Co. v. O'Connor*, U. S. S. C. Nov. 19, 1888; 9 S. W. Rep. 112.

125. JURISDICTION— Court of Claims —Patent. —— A patentee exhibited his patent to an army board, which recommended its use in the army, and the ordinance department manufactured a number of the articles: *Held*, the court of claims has jurisdiction of his action for a reasonable royalty thereon. — *United States v. Palmer*, U. S. S. C., Nov. 19, 1888; 9 S. C. Rep. 104.

126. JURISDICTION—Writ of Error— Amount.——A writ of error does not lie to the supreme court from a judgment of the circuit court on an appeal bond conditioned to prosecute an appeal from the circuit to the supreme court when the amount in controversy is less than $5,000.—*Cogswell v. Fordyce*, U. S. S. C., Nov. 19, 1888; 9 S. C, Rep. 112.

127. JUSTICE OF THE PEACE— Judgment—Default.—— A judgment in a justice's court, where the defendant did not appear, for an amount larger than that indorsed upon the copy of the summons served upon him is void and may be enjoined.—*Basset v. Mitchell*, S. C. Kan., Nov. 10, 1888; 19 Pac. Rep. 671.

128. LANDLORD AND TENANT—Defective Building.—— Where a landlord leases without warranty a defective building and the lessee has full opportunity to ascertain its ruinous condition, which is apparent to the most casual observer, the landlord is not liable for damages resulting to the lessee from the fall of the walls. — *Davidson v. Fischer*, S. C. Colo., Nov. 16, 1888; 19 ac. Rep. 652.

129. LIMITATIONS—Admirality—Laches. —— A claim in admiralty, which would be barred at law by the statute of limitations, is barred by analogy on the ground of laches.—*Southard v. Brady*, U. S. C. C. (N. Y.), Oct. 15, 1888; 36 Fed. Rep. 560.

130. LIMITATIONS—Adverse Possession. —— Where a county road as located three small strips of A's land on B's side of the road, and small strips of B's land on A's side, and A and B have recognized such road for more than fifteen years as their boundary, ejectment to recover the land so cut off is barred. — *Hammond v. Williams*, Ky. Ct. App., Oct. 30, 1888; 9 S. W. Rep. 711.

131. LIMITATIONS— Adverse Possession—Grantee.—— Possession of land by a grantor and by those claiming under a second deed for the land, executed by him while in possession and after the first deed had been recorded will not be presumed adverse to the first grantee, without proof of ouster or of some unequivocal act amounting to an open denial of his title.—*Schwalbach v. Chicago, etc. R. R.* S. C. Wis., Dec. 4, 1888; 40 N. W. Rep. 579.

132. LIMITATIONS — Dower. —— An action for the assignment of dower is barred in Missouri in ten years.— *Chouteau v. Harvey*, U. S. C. C. (Mo.), Nov. 9, 1888; 36 Fed. Rep. 541.

133. LIMITATIONS—Feme Covert.——A deed to plaintiff's husband was executed in 1852. The husband died in 1879. Plaintiff sued in 1885 to have the deed set aside as obtained by fraud to her husband when the intent was, that she should be the grantee: *Held*, that the action was not barred. — *Summerlin v. Cowles*, S. C. N. Car., Nov. 26, 1888; 7 S. E. Rep. 881.

134. LIMITATIONS—Personal Property— Creditor. —— An action by a creditor of the donor of personal property to subject the same to the payment of his debt must be brought within two years. — *Connor v. Hawkins*, S. C. Tex., Oct. 26, 1888; 9 S. W. Rep. 684.

135. LIMITATIONS—Running of Statute. —— An action for payment due in 1866 and 1867 by deed of record reserving a vendor's lien, brought prior to Jan. 1, 1889, is not barred. — *Kerlin v. Kerlin*, S. C. App. Va., Nov. 15, 1888; 7 S. E. Rep. 849.

136. MANDAMUS—Public Duty—Parties.—— In *mandamus*, to enforce a purely public duty, not due the government as such, any private person may move as relator.—*State v. Weld*, S. C. Minn., Nov. 22, 1888; 40 N. W. Rep. 561.

137. MASTER AND SERVANT— Assumption of Risk.—— A brakeman, who, in attempting to let off a brake, known by him to be defective, is struck by a cattle-guard, which is dangerously near the track, and who was aware of such fact relative to the cattle-guards generally, cannot recover. — *Missouri P. R. R. v. Somers*, S. C. Tex., Nov. 9, 1888; 9 S. W. Rep. 741.

138. MASTER AND SERVANT — Contract — Construction. ——An old contract between employer and employee, providing for the payment of the latter of a per cent. of the profits of each year as wages, and, in case of the death of either during the year, at the rate, for the expired term, of a certain sum per annum, having been found by the jury to have been in force at the death of the employee, his executrix may recover the proportional part of the sum agreed, to the date of his death, though by reason of sickness he stopped work some time before. — *Dunlap v. Montgomery*, S. C. Penn., Nov. 5, 1888; 16 Atl. Rep. 41.

139. MASTER AND SERVANT—Negligence — Jury.——In an action by an employee against a railroad for personal injuries, where it appears that plaintiff, while lawfully riding on one of its trains and standing on the the lowest step of a car, was struck by a switch-signal, which was so near the track that it scraped the sides of the cars, it is error to withdraw the case from the jury.—*Boss v. Northern P. R. R.*, S. C. Dak., Oct. 2, 1888; 40 N. W. Rep. 590.

140. MECHANIC'S LIEN—Assignee— Executor.—— One who is made defendant in a suit of an administrator to enforce a mechanic's lien, who claims the fund by

reason of an assignment of the contract, under which the lien was required, cannot complain that the fund is distributed among other lienors, when he did not establish the assignment, and the debt due him, for which the assignment was made, has not been presented to the administrator for allowance. — *Red R. C. Bank v. Higgins*, S. C. Tex., Nov. 20, 1888; 9 S. W. Rep. 745.

141. MECHANIC'S LIEN — Description of Property.—— A notice of a mechanic's lien, which merely describes the property as that certain lot and parcel of land situated in said county of Nevada, State of California, and sought to be charged with this lien, and described as follows, to wit, is insufficient. — *Penrose v. Calkins*, S. C. Cal., Nov. 26, 1888; 19 Pac. Rep. 641.

142. MECHANIC'S LIEN—Parties—Demurrer.—— A complaint, avering that plaintiff furnished labor upon, and furnished materials for, the building in question under a contract with defendant, but making no reference to a principal contractor, is not demurrable for defect of parties.— *Frederickson v. Riebsam*, S. C. Wis., Nov. 8, 1888; 40 N. W. Rep. 501.

143. MECHANIC'S LIEN — Title. —— One holding real estate under a deed conveying the right of occupancy and covenanting for the conveyance of the absolute title, may subject his interest therein to a mechanic's lien. — *Pierce v. Osborn*, S. C. Kan., Nov. 10, 1888; 19 Pac. Rep. 656.

144. MORTGAGE — Foreign Execution. —— A deed of trust, executed in another State, on property in Louisiana, to secure the payment of promissory notes, will be enforced as a conventional mortgage.— *Pickett v. Foster*, U. S. C. C. (La.), Feb. 1888; 36 Fed. Rep. 314.

145. MOTGAGES — Future Advances. —— A recorded mortgage to the extent of the sum limited in it is entitled to priority for future advances made without knowledge of subsequent incumbrances, including mechanics' liens, though it is not expressed to be for future advances, and the agreement making it a lien therefor is verbal.— *Tapia v. Demartini* S. C. Cal., Nov. 21, 1888; 19 Pac. Rep. 641.

146. MUNICIPAL CORPORATIONS — Tax-payers — Suits. ——In proper cases citizens and tax-payers may sue in the enforcement or restraint of municipal action, but they cannot in affirmance of its contracts which contain no stipulation *pour autrui*.—*Loeber v. New Orleans & C. R. R.*, S. C. La., May 25, 1888; 5 South. Rep. 60.

147. NEGLIGENCE.——A deck-hand was sent on shore in the morning before it was light, to cut ropes which held the boat. He cut the last one inside the knot by which it was fastened to the tree, causing it to rapidly unwind, and strike his leg, breaking it: *Held*, that the negligence caused the injury, and that his action therefor was properly nonsuited. — *Brown v. Wood*, S. C. Penn., Nov. 5, 1888; 16 Atl. Rep. 42.

148. NEGLIGENCE — Contributory — Jury. —— Under the evidence, where plaintiff in coming out of the depot was run over by a train, it was *held* error to direct the jury to find for defendant.— *Jones v. East T. etc. R. R.*, U. S. S. C., Nov. 12, 1888; 9 S. C. Rep. 118.

149. NEGLIGENCE — Dangerous Premises. —— The owner of a city lot bounded by a street cut down by the city thirty-eight feet below the grade of the lot, not being bound to guard the edge of his lot, is not responsible for the death of a policeman who comes upon the lot in pursuit of an offender, and is killed by falling into the street. — *Wood v. Floyd*, S. C. Penn., Nov. 5, 1888; 16 Atl. Rep. 43.

150. NEGLIGENCE—Defective Highway. —— In action for injuries sustained by reason of alleged defective highway where defendant urged that the accident was caused by the action of plaintiff's horse, unmanagable on account of defective harness, and where the court was asked to charge that if the accident was caused by the uncontrollable struggle of a choking horse their verdict must be for defendant, to which the court replied "refused unless plaintiff by his negligence contributed or was the cause of the uncontrollable struggle of the horse: *Held*, error.— *Chartiers Tp. v. Phillips*, S. C. Penn., Oct. 29, 1888; 16 Atl. Rep. 26.

151. NEGLIGENCE—Passengers—Railroads.——A railroad is not liable for injuries to a passenger sustained in attempting to alight from a moving train, which had passed the passenger's destination without stopping.— *Watson v. Ga. P. R. Co.*, S. C. Ga., Oct. 12, 1888; 7 S. E. Rep. 854.

152. PARTITION—Equity—Pleading—Amendment.—— A bill in equity for partition, filed by the heirs of a decedent, may be amended by adding the name of the widow as a party thereto, and by adding to the prayer, "and such other relief as they may be entitled to in the premises."—*Appeal of Cowan*, S. C. Penn., Oct. 29, 1888; 16 Atl. Rep. 28.

153. PARTNERSHIP—Accounting — Interest. —— Upon settlement of a partnership by a suit for an accounting, interest should be allowed on the amount found due to one partner from the institution of the suit, there being many items in dispute and no agreement as to interest.—*Carroll v. Little*, S. C. Wis., Dec. 4, 1888; 40 N. W. Rep. 582.

154. PARTNERSHIP—Injunction. —— A change in the location of the works of a partnership for the manufacture and sale of steel, as fixed by the articles of association, is a departure from the partnership enterprise, and may be enjoined by a minority of the members.—*Appeal of Gennings*, S. C. Penn., Oct. 29, 1888; 16 Atl. Rep. 19.

155. PARTNERSHIP—Suit Against Partner.——A made a contract with B for cutting hay, belonging to the firm of A and B, agreeing to pay for it himself and charge the firm: *Held*, that A might be sued alone by B for his services.—*Cowles v. Robinson*, S. C. Colo., Nov. 16, 1888; 19 Pac. Rep. 654.

156. PAYMENT—Voluntary—Recovery.——Money paid under mistake of law cannot be recovered back, where the transaction is unaffected by any fraud, trust, confidence or the like, and both parties knew all the facts.— *Erkens v. Nicolin*, S. C. Minn., Nov. 28, 1888; 40 N. W. Rep. 567.

157. PLEADING — Contradictory Defenses. —— Under Georgia law, the general issue and a plea of justification may both be filed in an action for malicious prosecution.—*Rigdon v. Jordan*, S. C. Ga., Oct. 22, 1888; 7 S. E. Rep. 857.

158. PLEADING—Contributory Negligence—Reply.—— In an action against a railroad for injuring a horse in unloading him, a reply alleging that plaintiff's agents, by their negligence and by reason of the wildness of the horse, suffered him to rear and fall, and also denying all injury, but not alleging that but for this negligence the horse would not have fallen, does not set up contributory negligence, and no reply is necessary.— *Owen v. Louisville, etc. R. Co.*, Ky. Ct. App., Nov. 15, 1888; 9 S. W. Rep. 698.

159. PLEADING—Corporations — Stock. —— *Held*, that the complaint stated a cause of action for failure to pay a subscription to corporate stock.—*Minneapolis, etc. Co. v. Crevier*, S. C. Minn., Nov. 20, 1888; 40 N. W. Rep. 507.

160. PLEADING—Exemption—Homestead.——A petition to recover land sold on execution, as being a homestead, need not aver that the execution debt did not exist before the purchase of the land.—*Snapp v. Snapp*, Ky. Ct. App., Nov. 27, 1888; 9 S. W. Rep. 705.

161. PLEADING — Insurance — Consideration. —— A complaint alleging that defendant, for a valuable consideration, entered into a contract of insurance, is sufficient on demurrer, without any allegation that any premium was ever paid or agreed to be paid.—*Bank of River Falls v. German A. I. Co.*, S. C. Wis., Nov. 8, 1888; 40 N. W. Rep. 506.

162. PLEADING—Uncertainty—Damages.——If a complaint, alleging injury from a defective sidewalk, does not sufficiently show the nature or amount of the damages, the remedy is by motion for a bill of particulars. —*Barney v. City of Hartford*, S. C. Wis., Dec. 4, 1888; 40 N. W. Rep. 561.

163. PLEADING — Vendor's Lien — Assignee. —— The complaint alleged that A gave B his notes for the un-

paid purchase moned for some land, that B died, and his administrator, for value, assigned the notes to plaintiff, who prayed for an enforcement of the lien and a sale of the land, but did not ask for a personal judgment: *Held*, that a good cause of action was stated.—*Bowles v. Smith*, Ky. Ct. App., Nov. 20, 1888; 9 S. W. Rep. 716.

164. PLEADING—Verification—Agent.——The agent of a plaintiff, having authority from his principal, may verify under oath the complaint filed in an action of forcible detainer.—*Mercer v. Ringer*, S. C. Kan., Nov. 10, 1888; 19 Pac. Rep. 670.

165. PRACTICE—New Trial—Conditions. —— The court directed a new trial, unless plaintiff should elect to take judgment against three of the defendants for a specified sum and against another for a specified part of that sum: *Held*, that plaintiff could not, under the order, take judgment against the three and have a new trial as to the other.—*First N. Bank v. Lincoln*, S. C. Minn., Nov. 30, 1888; 40 N. W. Rep. 573.

166. PRACTICE — New Trial — Newly-discovered Evidence. —— Newly-discovered evidence of the same kind as that used at the trial is not cause for a new trial.—*Brinson v. Faircloth*, S. C. Ga., Nov. 21, 1888; 7 S. E. Rep. 923.

167. PRACTICE—Trial—Directing Verdict. —— Where the plaintiff's evidence, conceding it the greatest probative force allowable by the rules of evidence, is insufficient to justify a verdict in his favor. the court may instruct the jury to find for defendant.—*Knapp v. Sioux Falls N. Bank*, S. C. Dak., Oct. 13, 1888; 40 N. W. Rep. 587.

168. PRACTICE—Trial—Improper Evidence. —— Where improper evidence is admitted, which is excepted to, a new trial will be granted, notwithstanding subsequent instructions to disregard it, unless from the whole case it is reasonably clear that the party objecting was not prejudiced.—*Juergens v. Thorn*, S. C. Minn., Nov. 26, 1888; 40 N. W. Rep. 559.

169. PRACTICE — Trial — Instruction. —— Where the party failed to ask a qualification of the instruction given, which would doubtless have been granted, and such qualification would not have changed the result, the judgment will be affirmed.—*Druck v. Nicolai*, S. C. Oreg., Nov. 5, 1888; 19 Pac. Rep. 650.

170. PRACTICE—Trial—Opening and Closing.——Under Georgia law, a defendant in a libel suit, who pleads both justification and the general issue, is entitled to open and close.—*Johnson v. Bradstreet Co.*, S. C. Ga., Oct. 22, 1888; 7 S. E. Rep. 867.

171. PRINCIPAL AND AGENT—Undisclosed Principal.—— A, who has intrusted cotton to a cotton buyer, and directed him to ship it in his own name to commission merchants, cannot recover the proceeds from the latter, when they have accounted with the latter before notice of the agency.—*Rosser v. Darden*, S. C. Ga., Nov. 5, 1888; 7 S. E. Rep. 919.

172. PUBLIC LANDS—Entry—Cancellation.——A entered two tracts of public land, paying the receiver of the land office therefor. Subsequently the commissioner of the general land office, finding one tract not subject to entry, cancelled both entries, without notifying A or offering to return his money: *Held*, that A was entitled to have conveyed to him the legal title held by one who had received a patent for the tract subject to entry after the order of cancellation.—*Cornelius v. Kessel*, U. S. S. C., Nov. 19, 1888; 9 S. C. Rep. 122.

173. PUBLIC LANDS — Title from State—Islands. —— Green island, in Tionesta creek, Forest county, Pa., is within what is known as the "new purchase," made in 1784–85, by the "commissioners appointed for making a further purchase of all the residue of the unpurchased lands within the limits of the State," and by the act of 1784 subject to be appropriated and sold, and included in a survey of the main land.—*Hulings v. Lewis*, S. C. Penn., Oct. 29, 1888; 16 Atl. Rep. 24.

174. RAILROADS—Car Trusts—Leases. —— Under the contract for lease of cars to a railroad, which, on payment of the rent for ten years, were to belong to the railroad, it was held that the car trust certificates were in legal effect mortgage bonds, and as such inferior in point of lien upon such rolling stock to a prior mortgage with an after acquired property clause.—*Central T. Co. v. Ohio C. R. Co.*, U. S. C. C. (Ohio), Aug. 29, 1888; 36 Fed. Rep. 520.

175. RAILROADS — Street — Damages. —— A railroad company may, under a statute and a city ordinance, construct and operate its railroad in a public street, making such alterations in the surface of the street as are necessary therefor, which do not necessarily impair the usefulness of the street, without being liable to abutting lot owners or others for damages.—*Ottawa, etc. R. Co. v. Larson*, S. C. Kan., Nov. 10, 1888; 19 Pac. Rep. 661.

176. RECORD—Contract—Deed.——Under the law of 1878, the record of an executory contract for the sale of lands is constructive notice to a purchaser thereof, but the prior record of such contract does not entitle the holder thereof to a preference over the grantee in a deed given before the execution of such contract.—*Thorsen v. Perkins*, S. C. Minn., Nov. 20, 1888; 40 N. W. Rep. 557.

177. REWARD—Criminal—Constable. —— Under Texas law, a constable may recover a reward for the arrest and conviction of a criminal in his own precinct, such offer having induced him to make the search.—*Kasling v. Morris*, S. C. Tex., Oct. 26, 1888; 9 S. W. Rep. 739.

178. SALE—Auction—Vendee.——The purchaser of a house and lot at public auction, who has refused to comply with his bid, may be sued for damages by the vendor, where the property, after due notice, has been resold at auction for a less sum.—*Ansley v. Green*, S. C. Ga., Nov. 5, 1888; 7 S. E. Rep. 921.

179. SALVAGE—Towage—Award.——A steamship worth with freight and cargo $568,600 lost a week's time and incurred $2,000 in towing in a disabled steamer worth $260,000. Salvage of $15,000 and $2,000 for expenditures were allowed.—*The California*, U. S. D. C. (N. Y.), Oct. 3, 1888; 36 Fed. Rep. 563.

180. SCHOOLS—District— Writ of Error. —— A writ of error does not lie to a refusal of the court of quarter sessions to open a decree establishing an independent school-district under act Pa. May 8, 1855, notwithstanding the act of May 20, 1856. — *School-district v. Cummings*, S. C. Penn., Oct. 29, 1888; 16 Atl. Rep. 32.

181. SEAMAN— Wages. —— Under the evidence it was held that libelant was employed as mate at $50 per month.—*Sacqueland v. The Meteor*, U. S. D. C. (N. Y.), Oct. 4, 1888; 36 Fed. Rep. 566.

182. SPECIFIC PERFORMANCE—Contract— Husband and Wife. —— On a bill for specific performance of a contract for the sale of land, praying for a good and sufficient deed, where defendant's wife refuses to join, and plaintiff, on the argument before the master, agrees to accept a deed from the husband alone, a decree may be entered granting so much of the prayer of the bill.—*Harrigan v. McAlese*, S. C. Penn., Oct. 29, 1888; 16 Atl. Rep. 31.

183. SPECIFIC PERFORMANCE — Laches — Waiver.—— Delay in the payment of the purchase money is no defense to a bill for specific performance, where it does not appear from the stipulation between the parties or from the nature of the property, that time was to be of the essence of the contract.— *Brown v. Guarantee T. & S. D. Co.*, U. S. S. C., Nov. 19, 1888; 9 S. C. Rep. 127.

184. SPECIFIC PERFORMANCE—Married Women—Agent. ——Specific performance of a contract for the sale of a married woman's property made by her agent will not be decreed, when he has exceeded the authority given him in writing, and the authority given by the husband is insufficient under the State laws.—*Hennessey v. Woolworth*, U. S. S. C., Nov. 26, 1888; 9 S. C. Rep. 109.

185. SUBROGATION—Surety — Creditor. —— Where a security is given with the intention that it shall be applied to the payment of the debt for the relief of the surety, or to enable the creditor to make his debt, equity will substitute him to the right of the surety. — *Talbott v. Lancaster*, Ky. Ct. App., Oct. 23, 1888; 9 S. W. Rep. 694.

186. TAXATION—Deductions— Corporations.— Under the former revenue law of Kentucky, corporations as well as natural persons, are entitled to deduct their indebtedness from the value of property not required to be listed.—*Com. v. St. Bernard C. Co.*, Ky. Ct. App., Nov. 26, 1888; 9 S. W. Rep. 709.

187. TAXATION—Exemption—Cemeteries.——Where a cemetery has been bought as an investment for a church, and whatever revenues are derived from it are for the use of the church, and may be appropriated to any purpose which to the church may seem fitting, it is not embraced within the provision of act Pa. May 14, 1874, which exempts from taxation "all burial grounds not used or held for private or corporate profit.—*Browns' Heirs v. City of Pittsburg*, S. C. Penn., Nov. 5, 1888; 16 Atl. Rep. 43.

188. TAXATION—Tax-title—Burden of Proof.——A State assignment certificate is only evidence of title when accompanied by proof of service of the notice of the expiration of the time of redemption, as required by law, and the burden of proof is on the party claiming title thereunder.— *Muller v. Jackson*, S. C. Minn., Nov. 22, 1888; 40 N. W. Rep. 565.

189. TAXATION—Void Sale—Possession.——The holder of the State's lien on real estate for taxes, acquired by purchase of the real estate at a void tax-sale, cannot, independent of the occupying claimant's law, defend his possession of the real estate upon the lien, even though he enter with the acquiescence of the owner. — *Taylor v. Slingerland*, S. C. Minn., Nov. 30, 1888; 40 N. W. Rep. 575.

190. TENANCY IN COMMON— Adverse Possession—Jury. ——Two brothers purchased two adjoining tracts of land together, but occupied them separately, each making improvements on the track on which he resided. One of them purchased the interest of the other in the tract occupied by himself, at a sheriff's sale, and made a lease of the mining privileges, stipulating for a royalty on the coal, and collecting it: *Held*, that whether the brother purchasing at the sheriff's sale paid a portion of the royalties to the other and his heirs, within the period of limitations, and, if he did so, whether it was as a charity or in recognition of a right in them as owners, was properly submitted to the jury. — *McCloskey v. McCloskey*, S. C. Penn., Oct. 29, 1888; 16 Atl. Rep. 30.

191. THREATS—Evidence.— On a trial for maliciously threatening to accuse another of burning a building, with intent to extort money, under Pub. St. Mass., ch. 202, § 29, the evidence was that defendants said that "unless you give us $100, we will make a jail-bird of you:" *Held*, that the crime charged involving no wrong to defendants, evidence of the truth of the charge was inadmissible on the question of malice or of intent, or to impeach the prosecuting witness. — *Commonwealth v. Buckley*, S. J. C. Mass., Nov. 28, 1888; 18 N. E. Rep. 577.

192. TOWNSHIPS—Negotiability.—— A township order is not negotiable, and the mere blank assignment thereof does not vest in the holder the right to maintain an action in his own name against the township for the amount of the order. — *Township of Snyder v. Bovaird*, S. C. Penn., Oct. 22, 1888; 15 Atl. Rep. 910.

193. TRESPASS TO TRY TITLE — Vacating Judgment — Pleading.—— Where a complaint states a good cause of action in trespass to try title, but also asks to vacate the judgment, under which defendant claims, and states facts showing the judgment to be void, the complaint is good on original demurrer. — *Bender v. Damon*, S. C. Tex., Nov. 23, 1888; 9 S. W. Rep. 747.

194. TROVER—When Lies. —— An action for conversion will not lie, when the taking and conversion of the property is with the knowledge and consent of the plaintiff.—*Tousley v. Bd. of Education*, S. C. Minn., Nov. 20, 1888; 40 N. W. Rep. 509.

195. TRUST—Constructive— Executor De Son Tort.—— Where A died, leaving a widow and six children, and without administering on the estate one of the sons undertook to complete the payments due by A on land purchased by him: *Held*, that he held the land in trust for the widow and the heirs.— *Risk v. Risk*, Ky. Ct. App., Nov. 17, 1888; 9 S. W. Rep. 712

196. TURNPIKES—Election of Officers—Notice.——The act Ky. April 12, providing for the election of turnpike road officers, did not fix a place for holding the election, and no presumption arises of notice to the stockholders. — *Cassell v. Lexington, etc. R. Co.*, Ky. Ct. App., Nov. 26, 1888; 9 S. W. Rep. 701.

197. VENDOR—Boundaries—False Representations.—— When a vendor points out to the vendee certain fences as boundaries of the land sold, he is liable therefor to the vendee if such fences are not the boundaries, whether he made the representations in good faith or not. — *Davis v. Nuzum*, S. C. Wis., Nov. 8, 1888; 40 N. W. Rep. 497.

198. WAYS—Obstruction—Removal.——Under Georgia law a person, on whose application a private way was established, cannot sue to require the removal of obstructions placed therein without proof that the way is the same originally appropriated, that it does not exceed the prescribed width, and that he has himself kept it open and in repair. — *Collier v. Farr*, S. C. Ga., Oct. 22, 1888; 7 S. E. Rep. 860.

199. WILLS—Ambiguity—Devisees.—— A devised his estate to his wife during her life or widowhood, and bequeathed $1,000 more to one son than the others, and directed that, if any died without issue, that their shares should be divided among the others: *Held*, that each child took an equal part of his estate, subject to the mother's right with the exception in favor of the one son.— *Ferguson v. Thomasson*, Ky. Ct. App., Nov. 17, 1888; 9 S. W. Rep. 714.

200. WILL—Construction—Legacy. —— Testator gave to his three married sisters "each the sum of $3,000 to be paid them however without interest and in such installments and at such times as my executors may deem proper in their discretion so as not to impair my investments or cause loss or injury to my estate," and afterwards gave a like sum to an unmarried sister payable out of the income of the estate: *Held*, that the legacies to the married sisters were payable out of the *corpus* of the estate. — *Appeal of Patterson*, S. C. Penn., Nov. 5, 1888; 16 Atl. Rep. 38.

201. WILL—Construction — Powers. —— Where a testator devised property to his wife for life with power to dispose of the same by will in such manner as she might see fit, and the wife directed by her will that all her debts be paid: *Held*, that such direction to pay debts did not change the land therewith as the wife had no power to incumber it. — *Balls v. Dampman*, Md. Ct. App., Nov. 22, 1888; 16 Atl. Rep. 17.

202. WILLS—Realty—Investment.—— A directed land in Wisconsin to be sold and an investment of the proceeds in land in Missouri for a certain time and for certain purposes: *Held*, that such equitable conversion might be effected, unless it opposed Missouri law, though it was repugnant to Wisconsin law. — *Ford v. Ford*, S. C. Wis., Nov. 8, 1888; 40 N. W. Rep. 502.

203. WITNESS—Attorney—Waiver of Privilege.——Defendant, alleging that she was deceived in relation to her rights by her counsel, and having given testimony in relation thereto, cannot object to testimony by such counsel upon the same matters. — *Hunt v. Blackburn*, U. S. S. C., Nov. 26, 1888; 9 S. C. Rep. 125.

204. WITNESS—Competency—Felony. ——One against whom a judgment of conviction for a felony has been entered, but against whom sentence has not been pronounced, is not disqualified as a witness in a criminal case, under Texas law. — *Arcia v. State*, Tex. Ct. App., Oct. 26, 1888; 9 S. W. Rep. 685.

205. WITNESS—Transactions with Decedent. —— When a party to the cause on trial is incompetent to prove the facts, on which his title rests, he is incompetent to prove the more general fact of his ownership in connection with such other facts.—*Robson v. Hains*, S. C. Ga., Nov. 21, 1888; 7 S. E. Rep. 926.